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ABSTRACT

This document explores the interaction between the Title I legal framework and selected state and local compensatory education programs (SCE). Specifically, it is concerned with: (a) whether the language of the Title I legal framework setting forth the basic local educational agencies (LEA) program requirements applicable to SCE programs is sufficiently clear and (b) whether these basic LEA program requirements restrict unnecessarily the design of SCE programs for educationally deprived children. The six states selected for study were: California, Michigan, Washington, Maryland, Florida, and Pennsylvania. The first part of the paper describes the legal framework of Title I and the state compensatory education program and other special state programs in the six states surveyed. Key similarities and differences between the state program and Title I are highlighted. This discussion introduces the issues presented in Part 3 of the paper and provides an overview of the project's major findings, conclusions, and recommendations. Part II of the document includes a detailed description of the six SCE legal frameworks. The third part of the document analyzes the interrelationships between the state programs and the relevant Title I requirements and analyzes the problems that arise in coordinating Title I and SCE efforts. In addition, the relationship between Title I and special state programs other than SCE programs is explored. Statutory and regulatory changes in Title I to better accommodate SCE and other special programs are recommended. (Author/AM)

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A DESCRIPTION AND ANALYSIS OF THE RELATIONSHIP BETWEEN TITLE I, ESEA AND SELECTED STATE COMPENSATORY EDUCATION PROGRAMS

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

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PART I
INTRODUCTION AND OVERVIEW OF THE PAPER

I. Purpose of the Paper

On April 11, 1965, Congress enacted the Elementary and Secondary Education Act[1] (ESEA) which was designed to expand educational opportunities in the nation's elementary and secondary schools. "Title I"[2] of that Act provides financial assistance to local educational agencies[3] (LEAs) to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Later amendments have "set aside" certain amounts of Title I funds for handicapped children,[4] Indian children,[5] agricultural migrant children,[6] children in institutions for the neglected and delinquent children,[7] and children of migratory fishermen.[8]

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[1] P.L. 89-10 (20 U.S.C. 241a et. seq.)

[2] "Title I" of ESEA was originally designated "Title II" of P.L. 81-874 (1950) pertaining to Federal aid to impacted areas. In January, 1968 Congress redesignated the enabling legislation as Title I of ESEA.

[3] The term "local educational agency" means a "public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or such combination of school districts or counties as are recognized ina State as an administrative agency for its public elementary or secondary schools . . ." Section 403 (6)(B) of P.L. 81-874.

[4] P.L. 89-313 (November 1, 1965).

[5] P.L. 89-750 (November 3, 1966).

[6] Id.

Congress, in the Education Amendments of 1974 (1974 Amendments), extended the Title I program through June 30, 1978. The 1974 Amendments also mandated that the National Institute of Education (NIE) undertake a study of compensatory education programs, including Title I and report the findings to Congress with recommendations concerning future federally funded compensatory and remedial education programs.

One aspect of the NIE study is an examination of the administration of Title I by the states.[9] This is an important subject because the Title I statute confers major responsibilities for the administration of Title I on State Educational Agencies[10] (SEAs). Central to the study of program administration and to any conclusions concerning the future of federal compensatory education efforts is an understanding of the legal framework of Title I. This legal framework includes program requirements which specify how Title I programs are to be designed and how federal funds are to be used by LEAs which receive Title I funds, thereby defining the objectives of Title I program administration. The legal framework also includes the respective functions which SEAs and the United States Office of Education (OE) are to perform in the administration of Title I. The National Institute of Education has contracted with the Lawyers' Committee for Civil Rights Under Law to conduct the "Compensatory Education Study - Survey of Legal Standards" (Legal Standards Project) which is to describe and analyze the legal framework of Title I and State compensatory education programs.

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[7] *Id*.

[8] P.L. 93-380 (August 21, 1974).

[9] Section 821 of the 1974 Amendments (20 U.S.C. 1221c note). See *Research Plan: Compensatory Education Study* (December 16, 1974) National Institute of Education.

[10] The term "State educational agency" means the officer or agency primarily responsible for the state supervision of public elementary and secondary schools. Section 403(7) of P.L. 81-874.

In general, the study's basic research objective is to determine what clarifications, additions, or deletions are needed in the present legal framework to improve program administration.

In satisfaction of the study's basic research objective, the Project is preparing several policy papers concerning (a) the basis for and clarity and restrictiveness of the program requirements applicable to local school districts applying for grants under Title I;[11] (b) the adequacy of the federal legal framework with respect to the administrative oversight responsibilities State Educational Agencies are required to perform;[12] and (c) the relationship between Title I and selected state compensatory education programs (SCE).[13]

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[11] This paper is entitled, "The Basis For and Clarity and Restrictiveness of Program Requirements Applicable to School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act". (September 1977)

[12] This paper is entitled, "An Analysis of the Legal Framework for State Administration of Title I of the Elementary and Secondary Education Act of 1965". (September 1977)

This paper explores the interaction between the Title I legal framework[14] and selected SCE programs. We use the abbreviation, SCE, to refer to both state and local compensatory education programs. Specifically, this paper is concerned with (a) whether the language of the Title I legal framework setting forth the basic LEA program requirements[15] applicable to SCE programs is sufficiently clear, and (b) whether these basic LEA program requirements restrict unnecessarily the design of SCE programs for educationally deprived children. In exploring these questions we also present aspects of the interaction between the Title I legal requirements and other special state programs--bicultural, Indian education, and California's Early Childhood Education (ECE) programs. Our focus, however, is on SCE programs.

For purposes of this paper, a requirement is considered to be "unclear" if the full range of acceptable and unacceptable practices under Title I cannot be comprehended by thoughtful consideration of the language of the provision and its context in the statute or regulations.

For purposes of this paper, a requirement is considered "overly restrictive" if, although consistent with the Title I statute and legislative history, it places burdens on LEAs not necessary to accomplish the stated policy.

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[13] This term is defined *infra*, p. 21.

[14] The phrase "Title I legal framework" is defined *infra* at p. 10.

[15] The phrase "basic LEA program requirements" is explained *infra* at p. 18.

II. Limitations of This Paper

This paper is a legal analysis of the relationship between the Title I legal framework and selected SCE legal frameworks. Thus, this paper is not concerned with whether the actual operation of state programs in particular locations conforms to the requirements of state law. Furthermore, this paper does not attempt to determine whether state or local compensatory education programs have been effective.

This paper analyzes OE correspondence as well as the statute and regulations. OE correspondence has contained several interpretations of key Title I requirements. Many of our recommended changes in the statute and regulations are based on OE letters. For these reasons we have included them in our discussion. The legal status of interpretations in OE letters (and other informal OE documents), however, is uncertain. Because of this uncertainty, absolute reliance on this paper as a definitive statement of the current law would be unjustified. Onlv OE can publish a document constituting a definitive statement of current OE policy.

The Legal Standards Project was not asked to analyze the feasibility of developing alternatives to the basic policies and categorical aid structure of the existing Title I legal framework. We were not asked to analyze, for example, (a) the advantages and disadvantages of repealing Title I and enacting block grant legislation, or (b) the Title I policy of targeting only those areas in a school district having high concentrations of children from low-income families. Instead, our task was to analyze the clarity and restrictiveness of the existing Title I legal framework with respect to SCE programs.

To the extent a statutory provision is unclear or overly restrictive, we propose appropriate modifications, additions or deletions. Similarly, to the extent we found that an OE requirement was inconsistent with the Title I statute, unclear or overly restrictive, we recommend changes to ameliorate such problems.

We propose no changes to regulations found to be consistent with the statute, clear and non-restrictive, even though an alternative interpretation might also be consistent with the statute and legislative history. For example, since 1968 OE regulations have defined "areas having high concentrations of children from low-income families" as those areas having a percentage or number of children from low-income families as high or higher than the district-wide average. Since the standard is clear, and, when read in conjunction with other provisions in the regulations, not overly restrictive given the less than full funding of Title I, we have not recommended that OE adopt an alternative definition, although other definitions might also be consistent with the Title I statute.

In certain cases, the limitations of our expertise or the need for empirical data prevented us from making specific recommendations. In such cases, we have limited our role to identifying issues requiring further analysis and decisions by others.

III. Research Methodology

To achieve our basic research objectives, the Legal Standards Project studied the federal Title I legal framework and the SCE legal frameworks of six states.

The states selected by NIE and the Legal Standards Project were: California, Michigan, Washington, Maryland, Florida, and Pennsylvania.

In addition to studying the SCE legal frameworks, we spent approximately one week in each state interviewing a wide range of state officials responsible for the administration of, among other things, the SCE programs including State Directors, their staffs, State Auditors, and legal counsel. These interviews were conducted between December of 1975 and March of 1976.

Prior to these site visits, the Project obtained from the states written policies developed by the states. These policy statements were reviewed and preliminary determinations were made concerning, among other things, (a) the substance and extent of state regulation; (b) the comprehensiveness and the specificity of these state regulations; and (c) similarities and differences with the Title I legal framework.

In the interviews, we attempted to determine: (a) the accuracy of our preliminary analysis; (b) perceived problems respecting the relationships between Title I and the SCE legal frameworks; and (c) areas which SEAs felt were most important to the effectuation of the purposes of Title I and their SCE programs.

During our study, we also visited at least one LEA in each state. These LEAs explained the operation of Title I and the SCE programs in their districts. No attempt was made to analyze the veracity of their comments. NIE will be addressing questions related to LEA perceptions under a separate contract.

Following our site visits, we prepared notebooks describing the states' policies, including appendices containing copies of written materials developed by the states. In sum, the sections of this report describing the SCE legal framework are based on our analysis of written state policies and oral interpretations recorded during our interviews.

IV. Organization of This Paper

The paper has three major parts. The first part is the introduction and overview. It describes the legal framework of Title I and the state compensatory education programs and other special state programs in the six states included in our survey. Key similarities and differences between the state programs and Title I are highlighted. This discussion introduces the issues presented in Part Three and provides an overview of the Project's major findings, conclusions and recommendations. Part II of this part includes a detailed description of the six SCE legal frameworks. The third part of the paper analyzes the interrelationships between the state programs and the relevant Title I requirements and analyzes the problems that arise in coordinating Title I and SCE efforts. In addition, the relationship between Title I and special state programs other than SCE programs is explored. Statutory and regulatory changes in Title I to better accommodate SCE and other special programs are recommended.

V. Definitions of Major Terms

A. Introduction

Throughout the paper, reference is made to certain terms describing the federal and state documents pertaining to the basic LEA program requirements. These terms are defined below. This section also describes in general the basic LEA program requirements analyzed in this paper.

B. The "Federal" or "Title I Legal Framework"

For purposes of this paper the federal or Title I legal framework includes all documents constituting the "formal" and "informal" legal framework. These terms are defined immediately below.

C. The "Federal Formal Legal Framework"

Whenever Congress enacts new legislation distributing federal funds, a formal legal framework must be developed to specify the requirements and conditions governing the receipt of benefits under the legislation. For purposes of this paper, the Title I "formal legal framework" includes the requirements appearing in the Title I legislation (Title I) and the General Education Provisions Act (GEPA), as well as the regulations officially promulgated by OE which were originally published in the Federal Register (FR) and subsequently codified in the Code of Federal Regulations (CFR). A regulation is a general rule issued by a government agency pursuant to an Act of Congress delegating such "rulemaking" authority to the agency. These regulations are considered to have the "full force of law."[16] This means that a requirement issued as a regulation is as legally binding as a federal statute -- so long as it is within the scope of the agency's delegated power.

In the paper there are references both to "regulations" and to "proposed regulations." The distinction can be explained by describing the process by which a regulation is promulgated. Under the General Education Provisions Act (GEPA), all Title I regulations must first be published in the Federal Register as proposed regulations. During the thirty-day period following this publication, the United States Commissioner of Education (Commissioner) must offer interested persons an opportunity to comment upon the proposed regulations. Following the thirty-day comment period, the Commissioner may (a) decide not to adopt the proposal as a final regulation; (b) adopt the proposed regulation in a modified form; or (c) finally adopt the regulation as originally proposed, without modification.

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[16] See Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942). Regulations having the "full force and effect of law" are commonly referred to as "legislative rules". See Davis, Administrative Law Text (West 1972) at p. 126.

If the agency decides to adopt a regulation[17] as final, either as originally proposed or as modified, it must republish the regulation in the Federal Register. Once each year, the regulations which have finally been adopted by OE are republished in Title 45 of the Code of Federal Regulations (cited as 45 C.F.R.).

In sum, the Federal Register is generally used by federal agencies to publish both proposed regulations and finally adopted regulations. The Code of Federal Regulations contains only the finally adopted regulations.

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17 / Section 431 of GEPA (20 U.S.C. 1232). The term "regulation" in accordance with the Education Amendments of 1976, is defined in Section 431 of GEPA to include "any rules, regulations, guidelines, interpretations, orders or requirements of general applicability prescribed by the Commissioner." This section of GEPA also provides that the Commissioner, concurrent with the publication in the Federal Register of a regulation, must transmit to Congress a copy of the regulation which will generally become effective 45 days after transmission unless Congress finds the regulation to be inconsistent with the Act.

In addition to the statute and regulations, the formal legal framework in effect during our interviews included "criteria" developed by OE which appeared in program guides issued by OE (renamed "Program Instructions", these guides were part of OE's Program Directive System). Although these guidelines were widely disseminated, they were never published in the Federal Register.[18]

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[18] It should be noted that the legal status of these guidelines in effect during our interviews is uncertain in light of Section 503 of P.L. 92-318 and Section 431 of GEPA. Section 503 provides, among other things, that OE conduct a "study" of all published policy pronouncements, including OE "criteria" or guidelines, and then publish the results of this study in the Federal Register. This study was to be completed in 1973. As explained supra, Section 431 of GEPA (20 U.S.C. 1232) generally provides that (1) all "regulations" must be published in the Federal Register; (2) the public must be provided with a 30-day comment period; (3) these regulations must be republished in the Federal Register; and (4) Congress must be given a 45-day period to review them before they go into effect.

Faced with questions concerning the legality of unpublished agency circulars and pronouncements containing mandatory language, the courts have generally concluded that the requirements are binding on state and local agencies with actual notice of them, in keeping with §552(a) of the Administrative Procedure Act (5 U.S.C. §501 et. seq.). See, e.g., Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1970); Hike v. Carter, 448 F. 2d 798, 803 (8th Cir. 1971); Kessler v. F.C.C., 326 F. 2d 673, 689-90 (D.C. Cir. 1963); Section 552 provides, in relevant part, "except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter to be published in the Federal Register and not so published."

[Footnote continues]

(footnote continued from previous page)

In two Supreme Court cases involving DHEW, Wheeler v. Barrera, 417 U.S. 402 (1974) and King v. Smith, 392 U.S. 309 (1968), the court has relied heavily on "requirements" contained in DHEW handbooks. In Wheeler, for example, the court authoritatively cited the handbook entitled Title I ESEA: Participation of Private School Children (DHEW Publication No. (OE) 72-62, which quotes or paraphrases Program Guide No. 24 (cancelled in 1972) in a determination concerning "comparable services" to educationally deprived children in private schools.

Moreover, Courts unwilling to accord guidelines unpublished in the Federal Register an equal status with officially promulgated regulations, nonetheless might find them to be binding on SEAs and LEAs through the practice and policy of judicial deference to agency administrative interpretations. Agency interpretations and guidelines are of "controlling weight" so long as they are consistent with the language of both statute and regulations. See e.g., Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969); Bowles v. Seminole Rock Co., 325 U.S. 410 (1945).

With respect to those guidelines containing directory language, the suggestions are considered acceptable courses of conduct which will satisfy a legal requirement and presumably have the legal effect of protecting a recipient against audit exceptions if the recommended course of conduct is followed. This latter proposition assumes that the statements contained in the guidelines are not inconsistent with the statute or regulations. Courts have explained that agency interpretations may be disregarded, particularly where they are at variance with its own regulations' clear language or the clear language of the statute. See e.g., Frances v. Davidson, 340 F. Supp. 351, 365-66 (D.C., Md.), aff'd., 409 U.S. 904 (1972); Stork v. U.S., 278 F. Supp. 869, 871 (D.C. Cal., 1967), aff'd. 430 F.2d 1104 (1967).

These program criteria were based on the law, and served to clarify and further explain the regulations. The program guides also provided basic information about Title I, including technical information about fiscal administration and evaluation, and suggestions for meeting the legal requirements regarding program development.

According to the Preamble to the September 28, 1976 revised regulations, the "criteria" set forth in the guidelines were superseded on October 28, 1976, the date the revised regulations became effective.[19]

In sum, the Title I statute contains the basic requirements governing the operation of Title I programs and projects. The regulations incorporate and explain in greater detail the essential elements of the law. The OE "criteria" in effect during our interviews were based on the law and clarified and further explained the regulations.[20]

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[19] The Preamble states, in relevant part, that "All preceding rules, regulations, guidelines and other published interpretations and orders issued in connection with or affecting Part 116 will be superseded when this regulation becomes effective" (41 FR 42894).

[20] Of course, a regulation and OE-developed criterion which is inconsistent with the legislative requirements would not be valid.

The first set of regulations implementing Title I (P.L. 89-10, the Elementary and Secondary Education Act of 1965), were published on September 15, 1965. Since then they have been amended on March 11, 1966, February 9, 1967, November 28, 1968, October 14, 1971, and June 28, 1973, to incorporate the provisions of P.L. 89-313, 89-750, 90-247 and 91-230. Proposed regulations implementing P.L. 93-380 appeared in the Federal Register on March 11, 1975 (40 FR 11472). Final regulations were issued on September 28, 1976 (41 FR 42894).

The first set of criteria, dated April 14, 1967, was issued as Program Guide No. 36. It was revised and reissued within a one-year period on March 18, 1968, as Program Guide No. 44. Today, this program guide is still used by SEAs and LEAs as one of the primary sources of OE policy.

D. The "Federal Informal Legal Framework"

1. Documents Constituting the "Informal Legal Framework"

Since 1965, the year Title I was enacted, an informal legal framework has supplemented the formal legal framework.

For purposes of this paper, the "informal legal framework"[21] in effect during our interviews included statements of policy issued by OE construing the statute and rules which it administers. OE interpretations concerning the informal legal framework are set forth in such documents as:

- OE handbooks,
- OE program support packages,
- OE guidelines and regulations which have been cancelled or superseded,
- OE program "Notices" and "Instructions" contained in the Program Directive System,
- internal OE memoranda, and correspondence between OE and particular states, construing the statute, regulations, and guidelines.

The informal legal framework also included oral statements made by OE officials at area workshops or in phone conversations (as described to the Project staff during interviews with SEA and LEA Title I personnel).

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[21] The term "informal legal framework" is synonymous with the legal term "interpretative rules". See Davis, Administrative Law Text (West 1972) at p. 126. In addition to performing the rulemaking function (an analysis of which is the focus of this paper), OE is required to monitor and enforce compliance with the rules (adjudicatory function). Periodically, OE sends review teams to each state to assess their competencies with respect to performance of specified administrative functions (for example application approval, monitoring and financial management). In addition, the HEW Audit Agency periodically audits the fiscal integrity of the grant transactions and compliance with the rules. The Title I adjudicative function generally includes (a) the refusal to approve annual plans submitted by states (these plans generally assure that they will faithfully administer Title I); (b) withholding of funds, and (c) recoupment of misspent funds alleged in the audits. Policy is communicated to interested parties in various ways, including for example, OE Review Team and HEW Audit Agency reports. This paper makes references to adjudicatory documents for the limited purpose of explaining the derivation or motivation behind a particular state policy. An analysis of the policy statements made as part of the adjudicatory function appears in a separate paper prepared by NIE.

2. The Distinctions Between the Formal and Informal Legal Framework

There are three basic differences between the formal and informal legal framework. First, unlike the regulations and guidelines, the policy pronouncements made through the informal legal framework are not always widely disseminated to all SEAs and LEAs. For example, a policy clarification made by OE in a letter to one SEA may be unknown to other SEAs. This is an important difference from the viewpoint of program administration.

OE and HEW generally do not disseminate memoranda. For example, OE Review Team Reports, which monitor the administration of Title I in individual states, are generally not forwarded to other states, although such reports are public information.

A second distinction between the formal and informal frameworks is that documents constituting the informal legal framework, especially the handbooks and program support packages, usually use simpler language than the provisions of the statute and regulations. Simplicity does not always increase clarity, but it often increases the frequency with which a document is used.

Although the statutory requirements and the officially promulgated regulations are legally binding obligations and the mandatory criteria set forth in certain program guides in effect during our interviews were binding on those LEAs having actual notice of them, [22] the legal status of the policy statements made within the informal legal framework in effect during our interviews is less clear. Generally speaking, these documents contained OE and HEWAA interpretations concerning the meaning of the statute, regulations, and guidelines. Unlike regulations published in the Federal Register, they did not have the "full force and effect of law." However, courts will defer to an agency's interpretation if (1) the interpretation is not contrary to the clear language of the statute or regulations; [23] (2) the agency has thoroughly considered the issues; (3) the agency's reasoning is valid; and (4) the interpretation is consistent with earlier and later pronouncements, and with the legislative history.[24]

The current legal status of the informal legal framework is even less certain. This uncertainty stems from two factors. First, as explained supra, the Preamble to the revised regulations states that "all preceding rules, regulations, guidelines, and other published interpretations and orders" affecting Title I were superseded the day the revised regulations became effective. Thus, for example, statements appearing in OE handbooks apparently are no longer in effect.

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[22] As explained supra, questions may be raised concerning the enforcibility of criteria found only in program guides; however, to the extent SEAs and LEAs have actual knowledge of them, we have assumed they are binding as legal requirements or contract terms.

[23] Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 1754n.11(1974).

[24] Skidmore v. Swift Co., 323 U.S. 134 (1944).

Second, under the Education Amendments of 1976 (P.L. 94-482) Section 431 of GEPA now requires, among other things, that all rules, regulations, guidelines, interpretations, orders, and requirements of general applicability issued by OE be published in the Federal Register as "proposed rules to take effect not less than thirty days after the date of publication." OE must then solicit comments to their proposals, republish the proposals in final form and then submit them to Congress. To date, none of the OE documents constituting the informal legal framework have been issued pursuant to these procedures mandated by the 1976 Amendments.

3. The Importance of Studying the Informal Legal Framework In Effect During Our Interviews

There are two basic reasons for considering the informal legal framework as part of our analysis of the administration of Title I. First, since those documents which were widely disseminated, e.g., handbooks and program support packages are phrased in non-legal, simplified language, they were and still are used and relied on extensively by SEA and LEA personnel as interpretations of legal requirements. For this reason it is important to analyze whether their statements are inconsistent with the statute and regulations.

Second, it is important to analyze those documents which are not widely disseminated to determine whether the federal government's interpretations were consistent, well-reasoned and added clarity to the formal legal framework and, if published in the Federal Register, would substantially increase the understanding of the legal requirements.

E. The State and Local Legal Frameworks

For purposes of this paper, the "state legal framework" includes the enabling legislation providing for the establishment of a special program, the officially promulgated regulations, state guidelines, state instructions accompanying application forms, handbooks and written correspondence with OE and LEAs.

For purposes of this paper, the term "state compensatory education" programs includes programs which provide supplemental services designed to meet the special educational needs of educationally deprived children. "Local compensatory education" programs include programs which provide supplemental services designed to meet the special educational needs of educationally deprived children. Local compensatory education programs may be funded by state or local monies. Throughout the paper we will be using the abbreviation "SCE" to refer both to state as well as local compensatory education programs.

In addition to the above terms, the following phrases are frequently used: "state or local special programs for educationally deprived children similar in nature to Title I" and "qualified SCE programs." These phrases refer to only those state and local programs which satisfy four conditions contained in the federal regulations. [25]

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[25] §116a.26(j)(5), 41 FR 42923, (September 28, 1976). The Title I regulations include four criteria for determining whether an SCE program qualifies for the exemption. First, the funds must be used for educationally deprived children. Second, the funds must be used for a program that is evaluated. Third, the SCE funds must be used for special, supplementary purposes. Fourth, the LEA must be accountable to the SEA for compliance with the first three requirements.

In addition to the above phrases, a number of additional terms are used throughout the paper. The term "comprehensive planning" refers to a plan developed by a school district or a particular school within a district accounting for all resources, federal and state, regular as well as categorical, available for providing services to participating children. A "consolidated application" means a single application submitted by an LEA to an SEA for approval for receipt of grants under Title I as well as special state sources.

Finally, we use the phrase "split-fund," which refers to the joint funding of a program with Title I and state or local funds from compensatory education programs similar in nature to Title I.

For example, to "split-fund a program" means that Title I funds may pay for a reading teacher providing services to educationally deprived children in Title I project areas while the SCE program pays for the reading materials used by the participating children.

VI. Overview of Title I Legal Framework

A discussion of the relationship between SCE programs and Title I must be based on a thorough understanding of the different SCE and Title I program requirements. The current Title I program requirements are analyzed in a paper prepared by the Legal Standards Project entitled, An Analysis of the Bases For and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965. For the convenience of the reader, a brief overview of the Title I program requirements follows.

Title I of the Elementary and Secondary Education Act (Title I) generally provides financial assistance to LEAs to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.

In enacting Title I, Congress made the following Declaration of Policy:

> In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children. [Emphasis added.] 26 /

Under the Title I legislation, the United States Commissioner of Education (Commissioner) makes payments to State educational agencies 27 / (SEAs) "on the basis of entitlements created under this title." 28 /

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26 / Section 101 of Title I (20 U.S.C. 241a).

27 / See supra, note 10 for the definition of the term "State educational agency".

28 / Section 102 of Title I (20 U.S.C. 241b).

To determine the amount of a state's entitlement the National Center for Education Statistics computes basic grants based on the number of children from low-income families residing in each county in the state.[29]

Once an SEA is notified of its total allocation for each county, it distributes the funds to those school districts submitting applications approved by the SEA.

Each application submitted by an LEA to an SEA for approval must contain specific assurances or demonstrate that the LEA will comply with particular Title I requirements.

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[29] All states are entitled to receive funds, and state entitlements are based on the number of children from low-income families residing in the state according to the most recent census and A.F.D.C. statistics as determined by the Commissioner. The original Title I formula was 50% (the "federal percentage") of the average per pupil expenditure in the state multiplied by the number of children (aged 5 to 17) from low-income families. The 1966 Title I amendments increased payments to low expenditure states by allowing the state or national per pupil expenditure to be used, whichever was higher. Low-income families were defined as those families with incomes below the poverty level ($2,000 as of 1966, $3,000 as of 1968, $4,000 as of 1972), plus those families with incomes above the poverty level receiving A.F.D.C. payments. In fact, the $2,000 level was used because Congressional appropriations have never been large enough to fund at a higher level. Congress mandated the use of 1970 census statistics as of July 1, 1972 (P.L. 91-230).

The 1974 Amendments (P.L. 93-380) altered the formula significantly: the state's per pupil expenditure is now multiplied by 40% and the per pupil expenditure level for any state is limited to a range of between 80% and 120% of the national average. The low-income factor is determined by the "Orshansky index" which adjusts the poverty level according to family size and farm/non-farm location. Additionally only two-thirds of the children from families receiving A.F.D.C. payments are now counted. The effect of these changes is to provide more aid to states with a high proportion of families below the "Orshansky index" of poverty and to decrease payments to urban areas where A.F.D.C. payments often put families above the "Orshansky index."

In the words of the Title I statute, funds provided under Title I must be used to "expand and improve" the educational programs for educationally deprived children[30] and for "programs ... designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families."[31]

Each of the above words and phrases from the statute has a special significance which forms the basis for a requirement or series of requirements that LEAs must satisfy to receive grants under Title I.

In order to ensure that Title I programs best meet the needs of the intended beneficiaries, i.e., "educationally deprived children" residing in areas "having high concentrations of children from low-income families", the regulations and guidelines issued by OE contain eligibility and targeting requirements. The eligibility requirements[32] specify the schools within a district eligible to receive funds and the children in those schools eligible to participate in Title I programs. The targeting requirements establish criteria for selecting, from the list of eligible schools and children, those that will actually participate in Title I programs. [33] In most school districts insufficient funds are available to design comprehensive programs for all eligible areas and for all eligible children. Since Congress has never fully funded Title I, funds have generally been insufficient in this regard since the inception of the program. The eligibility and targeting requirements also ensure that LEAs do not discriminate against children qualifying for Title I services, simply because those children attend private schools.

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[30] Section 101 of Title I (20 U.S.C. 241a).

[31] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A) (emphasis added).

[32] Id.; 45 C.F.R. §116.17(d)(1975) and 45 C.F.R. §116.17(a)(1975) now at 45 C.F.R. §116a.20(1976) and 45 C.F.R. §116a.21(c)(1976).

In order to ensure that Title I programs are "designed" [34] to meet the special educational needs of educationally deprived children in low-income areas, the regulations and guidelines require LEAs to demonstrate in their applications for Title I funds that (a) they have undertaken a comprehensive assessment of the special needs of the eligible children (needs assessment);[35] (b) they have described the objectives of the projects in relation to the special needs identified in the needs assessment (program objectives); [36] (c) they have designed their program in accordance with the objectives of the project (program design);[37] (d) they have concentrated funds on a limited number of programs and projects, thereby increasing the likelihood of success in meeting the objectives of the project (concentration);[38] (e) they will evaluate the projects to determine whether the objectives of the project have been met (evaluation);[39] (f) they have coordinated efforts with other agencies concerned with the same target population (coordination);[40] and (g) they have disseminated information concerning effective teaching strategies and techniques to Title I teachers (information dissemination).[41]

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[33] Program Guide No. 44, Section 4.6 and 45 C.F.R. §116.17(f)(1975), now at 45 C.F.R. §116a.20(c)(1976) and 45 C.F.R. §116a.21(e)(1976).

[34] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

[35] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.21(1976).

[36] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.22 (a)(1)(1976) and §116a.22(b)(1)(1976).

Other requirements are also intended to ensure that Title I funds are used to "expand and improve" the educational offerings of educationally deprived children and for programs which are designed to meet the "special" educational needs of educationally deprived children, so that Title I funds are not used merely to duplicate or replace services normally provided to children in the school district. To this end, the statute and the regulations contain (a) a provision prohibiting the distribution of state aid in any way which takes an LEA's Title I allocation into consideration and then penalizes the LEA in the distribution of state funds; [42] (b) a requirement that school districts maintain their fiscal effort (maintenance of effort); [43] (c) a provision requiring that Title I funds supplement the level of state and local funding and a restriction against using Title I funds to supplant, i.e., replace, state and local funds that would have been provided to program participants but for the existence of Title I (supplement, not supplant); [44] (d) a provision that Title I funds may not pay for services ordinarily provided in non-Title I areas with state and local funds (ordinarily provided); [45] (e) a requirement that services provided with state and local funds in Title I schools be comparable, that is, approximately equal, to services provided in non-

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[37] 45 C.F.R. §116.18(b)(1975), now at 45 C.F.R. §116a.19(b) and §116a.22(1976).

[38] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)); 45 C.F.R. §116.18(a) and (e)(1975), now at 45 C.F.R. §116a.20(a and §116a.20(b)(1976). Concentration is closely related to the targeting requirements described above.

[39] Section 141(a)(6) and 141(a)(7) of Title I (20 U.S.C. 241e(a)(6) and (a)(7); 45 C.F.R. §116.22(1975), now at 45 C.F.R. §116.43(1976).

[40] 45 C.F.R. §116.24(1975); now at 45 C.F.R. §116.41(1976).

[41] Section 141(a)(10) of Title I (20 U.S.C. 241e(a)(10); 45 C.F.R. §116.25(a)(1975), now at 45 C.F.R. §116.44(a) (1976).

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[42] Section 143(c)(1) of Title I (20 U.S.C. 241g(c)(1)); 45 C.F.R. §116.44(1975), now at 45 C.F.R. §116.18(1976).

[43] Section 143(c)(2) of Title I (20 U.S.C. 241g(c)(2)); 45 C.F.R. §116.45(1975), now at 45 C.F.R. §116.19(1976).

[44] Section 141(a)(3)(B) of Title I (20 U.S.C. 241e(a)(3)(B)); 45 C.F.R. §116.17(h)(1) and (2)(1975); now at 45 C.F.R. §116.40(1976).

[45] 45 C.F.R. §116.17(h)(3)(1975). Under the revised regulations, the "ordinarily provided" provision has been replaced by the "equitably provided" provision. 45 C.F.R. §116a.22(b)(10)(1976).

Title I schools (comparability);[46] and (f) a requirement that Title I funds be used only for the excess costs of programs and projects (excess costs).[47]

More specifically, the provision which prohibits penalizing reductions in state aid, along with other provisions, ensures that receipt of Title I funds is not used as a basis for discrimination.

The "maintenance of effort" requirement ensures that Title I grantees do not shift to the federal government their ongoing financial responsibilities for their education programs and helps ensure that federal assistance serves a supplemental rather than a basic education function.

The "supplement, not supplant" provisions prohibit LEAs from using the existence of Title I funds as a basis for discriminating against educationally deprived children residing in low-income areas in the provision of state and local funds. In other words, educationally deprived children residing in low-income areas must receive the same level of state and local funds they would have received were Title I not in existence. They cannot be penalized in the provision of state and local funds because they receive assistance under

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[46] Section 141(a)(3)(C) (20 U.S.C. 241e(a)(3)(C)); 45 C.F.R. §116.26(1975), now at 45 C.F.R. §116a.26(1976).

[47] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)); Program Guide No. 44, Section 4.1, now at 45 C.F.R. §116.40(a)(2)(iii)(1976).

Title I. In no case may Title I funds be used to supplant state and local funds.

The "ordinarily provided" provision specified that Title I may not be used to pay for services ordinarily provided in non-Title I areas with state and local funds. As explained supra, this provision has been deleted from the revised regulations. In its place, the revised regulations include the "equitably provided" requirement. "Equitably provided" generally requires that an LEA provide state and local funds for services on an equitable basis without regard to the availability of Title I funds.

The "comparability" requirement, is intended to ensure that services provided with state and local funds to educationally deprived children attending Title I schools are approximately equal to services provided to children attending non-Title I schools, before the addition of Title I funds for Title I schools.

The "excess costs" provision ensures that Title I funds will be used only for the excess costs of programs which exceed the average per pupil expenditures of an LEA for children included in such projects.

In 1974, in defining the term "excess costs" Congress explained that in computing the state and local base, the LEA must exclude, among other things, expenditures for state or local compensatory education programs similar to Title I. The legislative history indicates that this provision was included to provide LEAs with the option of excluding from their comparability computations, expenditures used in state or local compensatory education programs similar to Title I.[48]

In addition, the legislation contains a requirement that programs contribute particularly to meeting the special educational needs of educationally deprived children, and the regulations contain a prohibition against the use of Title I funds to meet the general needs of the schools or the student body at large (general aid prohibition).[49]

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[48] As explained supra, the Title I regulations include four criteria for determining whether an SCE program qualifies for the exemption. First, the funds must be used for educationally deprived children. Second, the funds must be used for a program that is evaluated. Third, the SCE funds must be used for special, supplementary purposes. Fourth, the LEA must be accountable to the SEA for compliance with the first three requirements.

Finally, the Title I legislation and the regulations issued by OE contain provisions designed to ensure that the above LEA program requirements are being followed. The most important of these requirements are (a) parent involvement,[50] (b) reporting to the SEA,[51] (c) recordkeeping,[52] and (d) access to information.[53]

In addition to the requirements with which LEAs must comply to receive grants under Title I, the federal statutes and regulations prescribe administrative functions which SEAs and OE must perform to ensure that LEAs do in fact design Title I programs to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families.

A major function of SEAs is to review and approve applications for Title I funds submitted by LEAs. Additionally, SEAs (a) distribute Title I grants to LEAs; (b) promulgate general rules concerning the administration of Title I; (c) undertake evaluations of the effectiveness of Title I programs; (d) provide technical assistance to LEAs; (e) interpret the federal and state LEA program requirements; (f) disseminate relevant information to LEAs, including the Title I legislation, federal regulations; (g) monitor the LEA Title I programs by making on-site visits to determine whether the LEA is meeting its assurances and acting consistent with the requirements contained in the legislation and regulations; (h) establish effective fiscal control and fund accounting procedures to ensure compliance with the statute and regulations; and (i) enforce compliance with the requirements contained in the statute and regulations.

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[49] Section 101 of Title I (20 U.S.C. 241a); 45 C.F.R. §116.17 (g)(1975), now at 45 C.F.R. §116a.22(b)(4)(iii), (b)(6), (b)(7) and (b)(8)(1976).

[50] Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14); 45 C.F.R. §116.17(o)(1975), now at 45 C.F.R. §116a.25(1976).

[51] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975), now at 45 C.F.R. §116.46(1976).

[52] Section 141(a)(7) of Title I (20 U.S.C. 241e(a)(7)); 45 C.F.R. §116.23(1975).

[53] Section 141(a)(7) and (a)(8) of Title I (20 U.S.C. 241e(a)(7) and (a)(8); 45 C.F.R. §116.17(n)(1975), now at 45 C.F.R. §116.45(1976).

Under the Title I legal framework, the Commissioner of Education also has administrative functions to perform. In general, the Commissioner is required to ensure that Title I funds are spent in a manner consistent with the requirements contained in the legislation and regulations. Specifically the Commissioner's responsibilities and duties include: (a) approving applications by SEAs; (b) developing and promulgating regulations; (c) distributing grants to SEAs; (d) providing technical assistance to SEAs and LEAs; (e) evaluating the effectiveness of Title I programs; (f) reporting to Congress; (g) monitoring LEA programs and SEA administration; and (h) withholding funds for failure to comply with the requirements contained in the Title I statute and regulations.

VII. An Overview of Selected State Compensatory Education Legal Frameworks

A. Introduction

In the previous section we provided an overview of the Title I legal framework.[54] The purpose of this section is to provide an overview of the various SCE legal frameworks reviewed by the Project, including a general description of the major similarities and differences between Title I and the various SCE programs.

The Project reviewed programs in six states, five of which were considered by the respective SEAs to be an SCE program. These programs included: a property tax relief program (not considered to be an SCE program by the SEA) (Pennsylvania); a program that is competitive in nature (Washington); and several entitlement programs (Florida, Maryland,[55] Michigan and California).

In addition to the SCE programs, California has a program entitled Early Childhood Education (ECE) which is designed to restructure the school environment for grades K-3. Because of the potential problems raised by the ECE concept, the ECE legal framework will also be considered.

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[54] A detailed description of the relevant sections of the federal legal framework appear *infra*. in Part III.

[55] Maryland has two programs. The Density Aid Program provides for the payment of supplemental funding for Baltimore, which is the only LEA qualifying for the assistance under the statutory formula. The second program (which has not been funded to date) is an entitlement program.

B. Basic Similarities Between Title I and SCE Programs

There are several important similarities among Title I, SCE, and other special state programs. First, all of them serve an identified class of intended beneficiaries. Recognizing the existence of limited special funds, lawmakers have focused these limited dollars on a subset of the general population of students. Under Title I, the class includes educationally deprived children residing in low-income areas. Under California's and Michigan's SCE programs, the class includes educationally disadvantaged children residing in the district, irrespective of the economic status of the particular area in which they reside.

California's ECE program serves all children in grades K-3 in selected schools.

Several of the programs include restrictions ensuring that the intended beneficiaries actually receive the benefits specified in the legislation. For example, under the regulations implementing Michigan's Chapter 3 program, projects are to be "for the benefit of identified pupils" and therefore are not to be used for "general aid" purposes.

A second similarity is the existence of requirements that SCE funds be used for supplementary purposes and not to replace regular funds. To this end, the Title I legal framework includes a maintenance of effort provision, a comparability provision and supplanting, equitably provided, and excess costs provisions.

Under California's SCE program, The Educationally Disadvantaged Youth (EDY) program, LEAs must comply with state comparability and state supplanting requirements. The state comparability criteria are different from the federal criteria, but the EDY supplanting provisions are virtually identical to the Title I supplanting concept. The California regulations provide that

> Districts maintaining programs under this chapter shall submit evidence that the sum of local and state apportionment resources utilized in programs for participating students has not been reduced.

Other California documents explain that, "the purpose of categorical aid is to provide services to selected students in addition to the 'regular' services provided with school district funds."

In Michigan, the state regulations say that Chapter 3 funds are not to "be used to supplant funds for regular instructional activities for identified pupils."

In other states, like Maryland, the legislation provides for the provision of supplementary programs. Thus, Maryland Density Aid funds must be used to provide compensatory programs for students with special educational needs...".

A third similarity is that Title I and several SCE programs contain requirements for needs assessment, program objectives, development of strategies for satisfying objectives, evaluation, and concentration.

For example, Michigan's Chapter 3 program has strict needs assessment, program objectives, program design and evaluation requirements. The concentration requirement states that, "the total number of pupils identified to be funded as program participants shall not exceed the number of students" on which the allocation is based.

In sum, Title I and several SCE legal frameworks surveyed include requirements ensuring that:

(1) the intended beneficiaries receive the benefits due them under the legislation;

(2) the SCE funds will be used in addition to the regular state apportionment (base) funds and not to replace such funds; and

(3) the program is well-designed and is evaluated.

In addition to the similarity of Title I and SCE program requirements, several SCE legal frameworks include provisions specifying the authority and responsibility of the SEA with respect to the administration of the programs.

For example, under California's EDY and ECE programs, the SEA must, among other things, approve applications, provide technical assistance, prescribe rules, conduct evaluations and monitor program compliance and the overall quality of the programs.

In other states the administrative structure set forth in the state legal framework is not well-developed (Michigan) or is virtually non-existent (Maryland). The lack of an administrative structure comparable to the Title I administrative structure is described in the next subsection under differences between Title I and SCE programs.

C. Basic Differences Between Title I and SCE Programs

The first major difference between Title I and the SCE programs surveyed concerns the definition of persons included in the class of intended beneficiaries. Although most of the SCE programs included in our survey designated a specific class of intended beneficiaries; the definition chosen was not always consistent with the Title I definition. Under Title I only educationally deprived children are eligible for assistance. The term "educationally deprived" as defined in the federal regulations, includes "children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age and children who are handicapped."

In Michigan, the definition of eligible children is more restrictive; in California and Maryland the SCE legal frameworks permit the inclusion of a broader class of children than Title I does.

Specifically, the Michigan Chapter 3 program states that the program participants are to be selected from among "the lowest achievers in basic cognitive skills. . ." The regulations explain that pupils in grades 2-6 are considered to meet the eligibility criteria if (1) they score one or more years below grade level in computation or communication skills on a standardized test or they demonstrate mastery of 40 percent or fewer of the reading or math objectives on the statewide assessment battery.

In California, a child is considered to be eligible under EDY if he/she scores below the 50th percentile in achievement on a standardized test or has additional "handicaps" due to linguistic, cultural, economic or environmental differences.[56]

In Maryland, the Density Aid Program provides that two-thirds of the amount appropriated must be used for students "with special educational needs resulting from educational or economically disadvantaged environments."

The second major difference concerns the existence (or lack) of requirements for targeting children. Under Title I the LEA must focus limited Title I funds on children who are in greatest need of assistance, i.e., furthest behind. In contrast most SCE legal frameworks do not require the targeting of those who are furthest behind. For example, the Maryland Disadvantaged Children Program includes references to children not functioning in accordance with their potential. In Michigan, the LEA must select program participants from among those who satisfy the eligibility criteria described above.

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[56] The California ECE program provides that all children in K-3 are eligible.

The third major difference concerns the method of determining which *areas* are eligible for special assistance. Under Title I only educationally deprived children in *low-income areas* are eligible for assistance. Under several SCE programs (e.g., California and Michigan) schools are *ranked* according to educational rather than economic criteria, i.e., schools are ranked according to the number of *educationally deprived* children in a particular area; the incidence of *low-income families* is *not* a factor.

The fourth area of difference concerns the program development requirements. While the Title I legal framework merely prescribes the *process* which LEAs must follow in designing Title I programs, several SCE legal requirements are more exacting. For example, California and Michigan require that SCE funds be used at the elementary level; both programs specify directly the subject areas which must be remediated; California requires individualized instruction; California includes minimum certification requirements for teachers; Michigan and California specify the number of pupils and the minimum per pupil concentration figures; and Michigan requires pre and post-testing of each participant as a condition for receiving Chapter 3 funds.

Finally, not all SCE programs specify SEA oversight functions. For example, in Maryland the SCE program is virtually self-executing. In Michigan, little oversight of LEA programs has occurred in the past.

VIII. General Findings, Conclusions, and Recommendations Concerning the Relationship Between Title I and Selected SCE Programs

A. Introduction

The previous sections of Part I provide an overview of the Title I legal framework and the state compensatory education legal frameworks reviewed by the Project. Set forth below is an overview of the Project's major findings, conclusions, and recommendations concerning the relationship between Title I and selected SCE programs.

This section will not analyze in detail the relationship between SCE programs and particular Title I requirements. Such an analysis appears in Part III of this paper.

B. General Findings and Conclusions Concerning the Relationship Between Title I and Selected SCE Programs

1. Introduction

The coexistence of the Title I and SCE legal frameworks raises two fundamental issues. First, does the Title I legal framework restrict the development and implementation of SCE programs? Second, is the Title I legal framework, as it pertains to SCE programs sufficiently clear?

We have generally concluded that the basic problems concerning the restrictiveness of the Title I legal framework were successfully solved by the Education Amendments of 1974.

The present legal framework does not interfere with the implementation of SCE programs.[57] States and LEAs have substantial flexibility in the design and implementation of their own programs without conflicting with any of the Title I requirements.

However, the Legal Standards Project concluded that the language of the legal framework does not take into consideration the needs of its audience--as a result several state and local coordinators did not understand the full range of acceptable and unacceptable practices under Title I.

In reaching these conclusions, the Legal Standards Project analyzed, among other things, the relationship between SCE programs and the Title I requirements pertaining to comparability, supplement, not supplant, equitably provided and coordination.[58] The following paragraphs summarize the Project's findings with respect to each of these requirements. A more detailed discussion of the Project's findings and conclusions appears infra, in Part III.

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[57] There are two exceptions to this conclusion. First, a basic problem continues to exist with the implementation of phase-in programs which generally aid an entire school. This is because unlike SCE programs, programs which generally aid all children in a particular school or grade do not qualify for an exemption from the comparability provision. Thus, programs like California's Early Childhood Education Program, which is designed to restructure the entire school environment in grades K-3 do not qualify for an exemption. This issue is analyzed *infra* p.203 Second, the 1974 Amendments fail to provide for circumstances where exceedingly large sums of SCE funds are available. This issue is summarized *infra*, p.259 and presented more fully in Chapter 8.

2. The Major Problems Concerning the Restrictiveness of the Title I Legal Framework Were Successfully Solved by the 1974 Education Amendments

In a previous section of this paper describing the Title I legal framework, we explained that Title I funds must be focused on meeting the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families. Thus, "Title I areas" are areas with high concentrations of children from low-income families.

Prior to the enactment of the Education Amendments of 1974, an LEA desiring to use substantial amounts of state or local funds to provide compensatory education services similar to those provided by Title I probably had to provide SCE services in all Title I areas before they could be provided in non-Title I areas.[59] The Title I comparability requirement generally provides that each Title I school must receive, at a minimum, services, which are comparable to services provided to the non-Title I average. Thus, the provision of substantial SCE services in non-Title I areas would raise the average level of expenditures in those areas; any Title I area that did not also receive the SCE services would probably not meet that level of expenditure and a violation of the Title I comparability requirement would result. This policy was restrictive in the sense that the purpose of the Title I comparability provision is to ensure that Title I areas are not discriminated against in the provision of a specified level of base services. The comparability provision prior to 1974, not only prohibited penalization; it also had the effect of requiring LEAs to favor low-income areas in the distribution of SCE funds. In many cases, such a requirement was inconsistent with state initiatives which were designed to meet the needs of all educationally deprived children in the district, irrespective of their residency in low-income areas.

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[58] In addition to analyzing these requirements, the paper analyzes the relationship between SCE programs and the following Title I requirements: school attendance area and children eligibility and targeting, parent involvement and private schools.

Under the Education Amendments of 1974, an LEA, among other things, is permitted to exclude from its comparability computations, expenditures for "comparable state or local special programs for educationally deprived children."

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[59] This proposition is based on the premise that the LEA has distributed services paid for out of state and local base funds on a comparable basis.

The major effect of this statutory amendment is that LEAs no longer must favor low-income areas receiving assistance under Title I. The regulations implementing this statutory provision provide for substantial flexibility with respect to the design of SCE programs which may qualify for the exemption.

To qualify for an exemption from comparability, SCE programs need not be identical to Title I, they must only be similar.[60] Thus, SCE programs, unlike Title I programs, do not have to serve only low-income areas; they do not have to serve those children who are furthest behind; and they do not have to include parent involvement or teacher-aid training requirements. Therefore, many of the differences identified supra, between Title I and SCE programs surveyed by the Project do not raise legal problems for LEAs.

The supplement, not supplant and equitably provided provisions, like the comparability provisions (as modified by the 1974 Education Amendments), do not require LEAs to favor low-income areas with respect to the distribution of

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[60] The criteria were described supra, note 25.

SCE funds.[61] They encourage states and LEAs to provide SCE programs to educationally deprived children both (a) who live in Title I eligible areas but are not served because of insufficient Title I funds and (b) who live in ineligible areas. Supplement, not supplant and "equitably provided" simply require that educationally deprived children residing in low-income areas, as a group, receive their fair share of SCE funds in accordance with objective, non-discriminatory criteria established by the state or the LEA.

Because Title I is not fully funded many educationally disadvantaged children in low-income areas receive no Title I services. Without these requirements, SCE programs could ignore completely these unserved children and could serve only children in areas not eligible for Title I programs. Elimination of the supplement, not supplant and equitably provided requirements would create an incentive (a) to provide state and local supplemental programs only in areas ineligible for Title I and (b) to use Title I funds to provide the same supplementary

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61/ Although the coordinators in most states recognized the basic purposes of the supplement, not supplant and equitably provided provisions, some maintained that the existing policy should be changed to permit LEAs to use SCE funds solely in areas that are not eligible for assistance under Title I. In considering such a change, Congress must weigh the fact that since there are still substantial numbers of educationally deprived children residing in poor areas who currently do not receive any assistance under Title I because Title I is not fully funded such a proposal would have the effect of penalizing educationally deprived children residing in poor areas who would have received SCE funds but for the existence of Title I.

services in Title I areas. Such a policy would deprive children who are eligible for but do not receive Title I services of access to state and locally funded supplementary programs. The supplement, not supplant and equitably provided requirements assure that a state or LEA does not discriminate against such children in the provision of supplementary programs to educationally disadvantaged children. These requirements do not demand that SCE programs serve the same children or have the same objectives as Title I, but they do require accommodation of a primary goal of Title I: providing supplementary services for educationally disadvantaged children residing in low-income areas. Title I was not intended to provide merely those services educationally disadvantaged children would have received from SCE programs if Title I did not exist.

The Legal Standards Project concluded that the supplement, not supplant provision could be satisfied through numerous alternative funding methods. For example: a LEA might distribute SCE funds according to the number of educationally deprived children enrolled in each school. Then schools which also qualify for assistance under Title I could be skipped if the SCE program provides educationally deprived children in those schools services of the same nature and scope as Title I would have provided. Title I funds could then be used in other schools eligible for Title I. Other alternatives include: providing an equitable proportion of SCE funds to educationally deprived children residing in Title I as well as non-Title I areas according to objective criteria or using SCE funds, again according to objective criteria, to meet the needs of all educationally deprived children in a particular grade span, e.g., K-6, while using Title I funds in a different grade span, e.g., 7-12.

Whereas the supplement, not supplant and equitably provided provisions generally operate in a non-restrictive fashion, there is one exceptional situation where the provisionsmay be overly restrictive, resulting in a disincentive to further increase the level of SCE funding. While the current Title I legal framework offers an incentive for LEAs to implement SCE programs, the incentive may disappear due to the operation of the two provisions at high SCE expenditure levels. At some point, states and LEAs may feel a disincentive to continue the growth of their SCE programs.

In our view, this point occurs when the combined level of SCE and Title I funds employed in Title I areas of an LEA reaches a level equal to that authorized (as opposed to appropriated) by Congress for Title I in that LEA. At this level the continued application of the supplement, not supplant and equitable distribution requirements means that an LEA must use amounts of SCE funds in Title I areas, which when combined with the Title I funds in those areas, exceed the level of funds which the federal government, itself, is willing to authorize for compensatory education.

This is a practical and objectively-measureable point at which, from a policy perspective, states and LEAs may feel that the federal government is asking them to do more for Title I areas than Congress, itself, has determined should be done. Thus states and LEAs may, for this reason, feel a disincentive to increase the growth of their SCE programs.

The Title I coordination requirement prohibits LEAs from commingling Title I and SCE funds. This ensures that OE will be able to determine whether Title I funds are being expended properly. However, the coordination requirement does not prevent LEAs from using SCE and Title I funds simultaneously. OE has described five methods for pursuing a comprehensive planning approach.[62] The five methods reflect different ways of varying two factors--children served and services provided. Under two methods, Title I and SCE funds provide different services to the same children--either different programs or different components of the same program. Under the other three methods, Title I and SCE funds serve different children--either different grade levels, different groups pre-determined according to some factor other than grade level or different schools. These methods permit substantial flexibility in coordinating Title I and SCE funds and programs.

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[62] Unfortunately OE has not widely disseminated these methods.

In sum, we found that prior to 1974 the operation of the comparability provision, by requiring the inclusion of SCE funds, had the potential effect of requiring that LEAs favor low-income areas in the distribution of SCE funds in contravention of a state goal of serving educationally deprived children, irrespective of their residency.

The Education Amendments of 1974, by allowing LEAs, at their option, to exclude SCE funds, have successfully eliminated the restrictive aspects of the comparability provision. Under the current Title I legal framework, LEAs simply must provide SCE funds according to objective criteria developed by the states which do not discriminate against educationally deprived children residing in low-income areas who would have received SCE funds but for the existence of Title I. Educationally deprived children in poor areas must receive their fair share of SCE funds.

From a policy point of view, the question remains whether the Title I legal framework should include an additional incentive for states and LEAs to distribute large sums of SCE funds. As explained supra, we recommend that under specified conditions, SCE funds should be exempt from the supplement, not supplant and equitably provided requirements as a further incentive to states and LEAs to increase the levels of SCE funding.

3. Although the Title I Statute and Regulations Generally Lack Sufficient Clarity, the Informal Legal Framework is Sufficiently Clear

The paragraphs above outline the Project's general findings and conclusions regarding the degree of flexibility of the Title I legal framework. Unfortunately, we have found that the statute and regulations, by themselves do not adequately set forth these terms. The formal federal legal framework (the statute and regulations) do not explain with sufficient clarity the range of acceptable and unacceptable practices and policies which LEAs receiving SCE funds may pursue. The formal legal framework simply prescribes in general terms the standards and operative definitions controlling the operation of SCE programs; it does not explain how these general principles are to be applied in commonly occuring situations. In certain situations the standards are not even explicit; they must be gleaned from a perusal of several Title I requirements. [63]

OE, however, has already clarified many of the difficult issues in correspondence with SEAs. For example, OE has explained in correspondence with SEAs: (a) the circumstances under which an SEA may develop a consolidated application and allow its LEAs to undertake a comprehensive approach to the planning and implementation of Title I and SCE programs; (b) the application of the requirement that SCE funds be equitably distributed in accordance with objective criteria; and (c) five models explaining the circumstances under which an LEA may joint fund a compensatory education program from Title I and SCE sources.

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[63] See, e.g., our discussion infra of the Title I coordination requirements and the OE policies concerning the simultaneous use of Title I and SCE funds and the restrictions against commingling.

While OE has generally interpreted those provisions in the Title I legal framework pertaining to SCE programs in a clear, consistent, and non-restrictive manner, it has not widely disseminated its explanations to the persons responsible for administering and overseeing programs.

As explained supra, Title I permits substantial flexibility in the design and implementation of SCE programs (and with minor changes suggested by the Project would permit even greater flexibility), but OE has not provided all SEAs and LEAs with sufficient guidance concerning how to apply basic principles of the Title I statute and regulations.

The lack of clarity in the regulations and OE's failure to widely disseminate its clarifying interpretations has not encouraged flexibility in the coordination of Title I and SCE programs.

If OE's answers to persistent SEA questions concerning the application of requirements in the Title I legal framework to SCE programs had been disseminated in the Federal Register, it is our opinion that many of the erroneous impressions -- such as the impression that Title I requires the design of SCE programs identical in all respects to

Title I programs -- would never have been formed.[64]

OE's failure to widely disseminate its own interpretations is not just an administrative error, it is an omission contrary to the General Education Provisions Act (GEPA), which presently requires, among other things, that OE publish its interpretations in the Federal Register.[65]

C. Recommendations

We recommend that OE make two fundamental changes in its administration of Title I.[66] First, we recommend, consistent with GEPA, that OE include in regulations published in the Federal Register its interpretations explaining how Title I requirements are to be applied to SCE programs.

In other words, OE should include a separate section in the regulations entitled, "The Application of Title I Requirements to SCE Programs." This section should not contain substantive requirements; rather it should explain how the substantive requirements apply to SCE programs. The substantive requirements should continue to appear in Parts 116 and 116a.

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[64] An important qualification to the general conclusion must be noted. A review of state materials suggests that even those states which have reviewed OE interpretations appearing in written correspondence do not always act consistent with these interpretations. However, since the focus of our study is primarily on the relationship between Title I and SCE legal frameworks, the implications of inconsistent state practices is beyond the scope of our study. Such issues will be addressed by other NIE contractors.

[65] See supra, P12 , n.18

[66] This section does not include specific recommendations concerning the relationship between SCE programs and specific Title I requirements. These recommendations are set forth infra, in Part III.

This section should explain, for example: (a) the consequences of improperly excluding SCE funds from comparability computations (this would occur if the SCE program did not satisfy the four criteria set forth in the regulations), (b) the application of the supplanting and equitably provided provisions to SCE programs, including a description of *acceptable and unacceptable* methods of distributing SCE funds under this requirement, (c) the circumstances under which an LEA may employ a consolidated application, and (d) the various methods for joint funding a single compensatory education program with Title I and qualified SCE funds.

Second, as recommended in a separate paper prepared by the Legal Standards Project,[67] we recommend that Congress *require* OE to prepare a policy manual for use by OE staff, HEW auditors, SEAs, LEAs, and parents. The manual[68] should include, at a minimum (1) quotations of relevant sections of the Title I and GEPA statutes, (2) quotations of relevant regulations appearing in the *Code of Federal Regulations*,

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[67] The paper is entitled, "The Basis for and Clarity and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act."

[68] As explained *supra*, p.12 , n.,18, Section 431 of the GEPA Statute presently requires that OE treat "interpretations" in the same manner as it treats substantive regulations with respect to publication in the *Federal Register* of a notice of proposed rulemaking, comment period, re-publication and submission to Congress. It is our opinion that a mandate that OE prepare a manual that would *not* be inconsistent with the above cited section of GEPA so long as the following components of the proposed manual first appear in the *Federal Register* pursuant to the procedures of Section 431: (1) quotations of relevant regulations, (2) summaries of OE interpretations, and (3) examples of actual applications of the requirements in the regulations. The remaining

(3) explanation of the purpose of each requirement, with references to the legislative history, where relevant, (4) summaries of OE responses to SEA requests for interpretations, including examples of actual applications of the standards and operative definitions set forth in the regulations, (5) summaries of final decisions rendered by the HEW Audit Hearing Board, (6) final determinations made by OE concerning audits closed without reaching the Hearing Board, and (7) summaries of relevant court decrees.

The manual should be organized by requirement and by subject area. One of the subject areas should be the application of Title I requirements to SCE programs.

(footnote continued from previous page)

components of the proposed manual, since they are not "rules, regulations, guidelines, interpretations, orders, or requirements of general applicability," need not be published in the Federal Register. We do, however, recommend that consistent with the Freedom of Information Act that OE publish in the Federal Register a notice that such a manual exists. (See 5 U.S.C. 552.) In the paper cited to in the previous footnote, we recommend that Section 431 of GEPA be amended to require that OE "interpretations" simply be published in the Federal Register. OE should not be required to first publish their interpretations in proposed form subject to comments, republication and submission to Congress since interpretations, unlike substantive rules, do not have the "full force and effect of law." Moreover, application of the burdensome procedure to interpretations discourages rather than encourages clarification by OE of issues requiring interpretation.

PART II

DESCRIPTION OF SELECTED STATE COMPENSATORY EDUCATION LEGAL FRAMEWORKS

PART II: DESCRIPTION OF SELECTED STATE COMPENSATORY EDUCATION LEGAL FRAMEWORKS

INTRODUCTION TO PART II

Part II of this paper includes a description of the special state programs in the six states included in our survey. First, we will describe California's "Educationally Disadvantaged Youth" Program (EDY) and the "Early Childhood Education" Program (ECE).

Second, we will describe Washington's "Urban, Rural, Racial and Disadvantaged Education," Program (URRD). Third, we will describe Michigan's "Chapter 3" program. Fourth, we will describe Florida's compensatory education program. Fifth, we will describe Maryland's compensatory education programs. Finally, we will describe Pennsylvania's special aid programs.

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CHAPTER I
CALIFORNIA

SECTION 1: INTRODUCTION

The state of California has enacted several special programs designed to meet certain identified needs. The state programs include a special teacher employment program, a school library resource program, a state bilingual program, and a state compensatory education program referred to as the Educationally Disadvantaged Youth Program (EDY or SB90). The EDY program, which interrelates directly with Title I is described in detail in this chapter.

The EDY program is virtually identical to Title I in purpose and structure, with two important differences that should be noted. The first difference concerns the class of students eligible to participate in compensatory education programs. Title I defines educationally deprived children solely in terms of functioning below the level of educational attainment appropriate to children of similar age. EDY, on the other hand, defines educationally disadvantaged youth as including the above category of children defined in the Title I regulations, as well as children who have "additional handicaps due to linguistic, cultural, economic or environmental differences," regardless of their level of educational attainment.

Secondly, unlike Title I which ranks schools based on economic criteria, EDY ranks based on the degree of educational disadvantagement.

Thus, the differences concern which children and which schools may receive benefits. However, the state requirements concerning program design apply equally to Title I and EDY.[69] The SEA personnel interviewed uniformly explained that there are virtually no differences between a Title I and an EDY program. For example, the requirements concerning needs assessment, establishing program objectives, actual components of the program, and restrictions against supplanting apply equally to EDY and Title I.[70]

In addition to the above program the state legislature has enacted Early Childhood Education legislation (ECE) which allocates funds through districts to individual school sites to promote comprehensive reform and restructuring of the school's environment. In brief, ECE restructures the school environment for all children in grades K-3, focusing primarily on the development of individual instructional plans for the purpose of enabling each child to develop his/her potential. EDY and Title I are directed at accelerating the educational achievement of only educationally deprived children.

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[69] California has promulgated what it refers to as "consolidated regulations." These regulations generally apply to Title I as well as various special programs funded from state sources. In some cases, these state requirements go beyond the Title I requirements, for example, they require that an LEA provide priority to children attending elementary schools.

[70] It should be noted however, that under the state legal framework, an LEA may obtain a waiver from any program requirement applicable to a state program.

The ECE program is competitive in nature. It will be described and analyzed in this paper because although it is considered a program which generally aids an entire school population and, as such, is not considered a state compensatory education program, it does relate directly to Title I on an operational level. The interrelationship concerns a structural question, i.e., should a state which allocates a substantial amount of special funds on an equitable basis to Title I as well as non-Title I schools, nevertheless be constrained by the operation of the comparability provisions? This question is analyzed infra. in Part III.

California has concluded that although Title I, EDY, and ECE have independent goals, organizational elements, eligibility criteria, and evaluation requirements, "these programs overlap in general intent, specific provisions and actual participants." [71]

Because this statewide overlap frequently results in allocations to schools from more than one funding source, the state has initiated what it calls "comprehensive program planning" and the "consolidated application." The consolidated application "provides a vehicle to bring together in a united planning effort these various state and federal supplementary funding sources, which were previously fragmented and often administered separately. Programs are defined at the local level by the school plan, and the school indicates how the various funds will be used to present a unified educational package." [72]

Consistent with the consolidated application approach, the SEA does not have separate departments implementing the various federal and state programs. Rather the SEA is divided by grade-span and function, e.g., elementary field services and secondary field services. A single person is responsible for approving a consolidated application.

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[71] Evaluation Report of ECE, ESEA Title I, and EDY 1974-1975 at p. 1.

[72] *Id.*

In addition, California has enacted as part of their administrative code, Consolidated Regulations which govern EDY, ECE, Title I as well as other special programs operating in the state.

SECTION 2

THE EDUCATIONALLY DISADVANTAGED YOUTH PROGRAM

I. Introduction

The Educationally Disadvantaged Youth Program (EDY) was passed in 1972. For the 1975-1976 school year the state legislature appropriated approximately 90 million dollars.

EDY is an entitlement program and funds are allocated to districts based on a formula that includes the following three factors:

- an index of potential impact of bi-lingual/bi-cultural pupils
- a ratio of the district's index of family poverty and
- a ratio of the districts' index of pupil transiency

A portion of the EDY funds allocated by the state legislature may be utilized for non-instructional costs, e.g., protection services (such as guards, alarm systems, and security devices, and repairs related to vandalism). These funds are general aid in that they do not support specific compensatory education efforts. Private schools are not eligible to receive EDY funds.

II. Program Requirements

A. Introduction

EDY program requirements are set out in the EDY legislation (§§6499.230-6499.238 of the California Code) and the Consolidated Regulations (Title 5 of the California Administrative Code). As mentioned previously, EDY and Title I programs look very similar on a school level and in fact, many of the Consolidated Regulations apply equally to both EDY and Title I. There are, however, differences in the legal framework of the two programs particularly in the areas of attendance area eligibility and child eligibility criteria.

The Consolidated Regulations and/or the EDY legislation include the following program requirements: school district eligibility; school attendance area eligibility and targeting; child eligibility and targeting; comparability; concentration; needs assessment; program design; program evaluation; parental involvement; supplanting; comprehensive planning and individualized instruction.

B. School District Eligibility

EDY is an entitlement program. School districts receive EDY funds based on an index which takes into account the number of bi-lingual/bi-cultural pupils, family poverty, and pupil transiency in the district.

Neither the EDY statute nor the consolidated regulations include a maintenance of effort provision, similar to the provision included in the Title I legal framework, ensuring that the total school district budget (excluding, among other things, federal funds and, e.g., EDY) has been maintained. Rather, the state legal framework includes a requirement that state and local funds utilized for the intended beneficiaries must be maintained, i.e., the school district must supplement and not supplant state and local non-categorical funds for participating students. For purposes of our analysis, this requirement is characterized as a "supplanting" provision and will be set forth infra. under the appropriate heading.

C. School Attendance Area Eligibility and Targeting

Unlike Title I which requires that LEAs rank school attendance areas according to economic criteria, California's consolidated regulations require that LEAs receiving EDY funds rank elementary schools according to educational need. The district is authorized to set the cut-off point for determining which elementary schools to include, so long as the school has "great needs."

Remaining EDY funds are then allocated to secondary schools which receive students from the funded elementary schools.

Specifically, Section 3934(c) of the consolidated regulations provides:

> Educationally Disadvantaged Youth Program. Each district receiving Educationally Disadvantaged Youth Program Funds shall rank school attendance areas according to educational need. Funds shall be allocated first to elementary schools with great

> needs. Districts will determine the cut-off point for schools included. Remaining funds should be allocated to secondary schools which receive students from the funded elementary schools. Union high school districts shall allocate funds to schools of greatest need, with preference to schools serving the youngest students.

In a document prepared by the SEA for inservice training interpreting the various requirements ("District Level Program Compliance Review Instrument Information for Inservice"), the following additional guidance is offered to LEAs.

First, schools presently designated as EDY program schools will again be so designated for the subsequent school year "unless the district presents data demonstrating that the level of educational need at the school no longer warrants its inclusion."

Second, if funds permit new schools to enter the EDY program, the school with the lowest average based on a statewide assessment program for the 2nd and 3rd grades will be the next one included in the program.

Third, consistent with SEA requirements pertaining to the targeting of children (discussed infra.) "a system of priorities must be established to assure concentration of services to the youngest students with the greatest need for assistance . . . . All eligible K-6 students must be served before services may be provided to the next school."

Part III of the paper will analyze the relationship between programs like EDY which rank according to educational need and Title I which generally ranks according to economic criteria. Part III will also analyze the manner in which EDY funds may be allocated to schools consistent with the federal supplement, not supplant provision.

D. Child Eligibility and Targeting

Section 3934(a) of the Consolidated Regulations provides that specific students shall be selected for participation in California's special categorical programs based on educational criteria. It should be noted that the regulations define educational criteria to include "a consideration of basic skills or differential levels of verbal functioning due to linguistic, social, cultural, or economic isolation." (§3934 of the Consolidated Regulations). The Comprehensive Instructions for the Consolidated Application state that students are eligible to receive services funded by EDY if they score below the second quartile of achievement in reading or have additional handicaps due to linguistic, cultural, economic or environmental differences.

The significance of the EDY definition of eligible children is analyzed in Part III.

With respect to the targeting of children, Section 3938 of the consolidated regulations requires that LEAs "give first priority for providing additional services to eligible preschool and elementary students and then to secondary students that received categorical services in feeder preschool and elementary school programs."

A document prepared by the SEA entitled, "School Level Program Compliance Review Instrument: Information for Inservice" includes additional guidance for LEAs.

> When resources are not adequate to serve all eligible students who scored below Q2 on a standardized reading or mathematics test, a system of priorities must be established to assure concentration of services to the youngest students with the greatest need for assistance.
>
> The district may identify students on the basis of those scoring lowest in reading and mathematics, or in reading only, or in mathematics only. The district may:
>
> a. Serve K or K-1, K-2, K-3, K-4, K-5 or K-6 students below Q1, or
>
> b. Serve K or K-1, K-2, K-3, K-4, K-5, or K-6 students below a designated percentile below Q2, i.e., 35 percent, or
>
> c. Serve all K or K-1, K-2, K-3, K-4, K-5, or K-6 students below Q2, or
>
> d. Serve all K-6 students below Q1 and serve as many students below Q2 as resources allow, starting with the youngest students, (i.e., serve all K-6 students below Q1 plus all students in K-1 below Q2, etc.)
>
> All 'eligible' K-6 students must be served before services may be provided to the next school.

The significance of the state targeting requirements as it relates to the equitable distribution of state compensatory education funds is analyzed infra. in Part III.

E. General Aid

There is no specific prohibition in the statute or consolidated regulations against the use of EDY funds for general aid purposes although the categorical nature of the program as providing financial assistance to meet the special needs of educationally disadvantaged youth and the program development requirements (needs assessment, eligibility of children and program design) focusing attention on the development of effective programs to meet their needs, suggest the existence of such a prohibition by implication.

In other words if a school district is required to use EDY funds for the purpose of developing effective programs designed to meet the needs of educationally disadvantaged youths, by definition, the school district is prohibited from using EDY for other purposes.[73]

---

[73] As explained *supra*., a specific portion of funds under EDY may be used for "security" purposes. This aspect of the EDY program provides general aid to the recipient school and for purposes of our paper is *not* considered a state compensatory education program.

F. Supplement, Not Supplant

The supplement, not supplant provision contained in the Title I legislation and regulations is not expressly included by name in the EDY legislation or consolidated regulations, although the basic concepts imbedded in the Title I legal framework prohibiting the penalization of participating children in the provision of state and local funds from non-categorical sources is included in the EDY statute, the consolidated regulations, and other state sources.

§6499.231 of the California Education Code provides that:

> Districts which receive funds pursuant to this chapter shall not reduce existing district resources which have been utilized for programs to meet the needs of low-income students. [Emphasis added.]

The consolidated regulations (§3937) referring to students participating in, among other things, EDY provides that:

> Districts maintaining programs under this chapter shall submit evidence that the sum of local and state apportionment resources utilized in programs for participating students has not been reduced. [Emphasis added.]

The "special" nature of the EDY funds is further clarified in various other state documents. For example, at p. 13 of a document entitled, "Instructions for Comprehensive Program

Planning" the SEA explains, "The purpose of categorical aid is to provide services to selected students in addition to the 'regular' services provided with school district funds."

In the state's "Program Quality Review Instrument" the section ensuring that supplemental services are provided to identified EDY students in accordance with the district's comprehensive plan asks: "To what degree are the activities designed to provide . . . SB90(EDY) students with increased time, type, or intensity of service being carried out according to plan?"

Finally, the consolidated application contains an assurance to be signed by applicant districts which states that:

> the expenditure under the funding sources checked below [including EDY] will not be used to supplant local district effort.

G. Comparability

Neither the EDY statute nor the Consolidated Regulations specifically mention a comparability requirement.

The state, however, in promulgating comparability regulations that will apply to both EDY and ECE programs cites to §6499.236 of the EDY legislation as the basis for the provision. The section reads in part as follows:

> The State Board of Education shall adopt regulations setting forth the standards and criteria to be used in the administration, monitoring, evaluation, and dissemination of programs submitted for consideration.

The regulations allow LEAs to select one of three methods of demonstrating comparability. Under all three options, locals must show that comparability existed exclusive of state, local and federal categorial funding and before the addition of California EDY and ECE monies.

The first option requires a district to demonstrate that,

> . . . the number of children per full-time equivalent classroom teacher and teacher's aide in schools pursuant to this section is not more than 110% of the average number of pupils per teacher and teacher's aide in all public schools serving comparable grade levels in the applicant's district.

This ratio differs from the current Title I ratio in three ways. First, the allowable degree of variance has been increased from five percent to ten percent. Second, the personnel included in the ratio has been narrowed to only classroom teachers and teacher's aides. The language indicates that two ratios will be required to fulfill this option: number of children per classroom teacher and number of children per teacher's aide. Third, rather than comparing services provided to each project area school compared with the average for non-project area schools, under the state's regulations the appropriate comparison is between services provided to participating schools compared with "all public schools serving comparable grade levels."

The second option requires a district to demonstrate that

> the annual expenditure per child for salaries per full-time equivalent teacher and teacher's aide, exclusive of that portion of salary based on longevity, in schools providing programs pursuant to this section is not less than 90% of expenditures per child in all public schools serving comparable grade levels in the applicant's district . . .

Again, the degree of permitted variance has been increased to 10% from the current 5% in the Title I comparability regulations.

Finally, the third option allows a district to achieve comparability by demonstrating to the

> satisfaction of the State
> Superintendent of Public Instruction that the resources per pupil
> enrolled in each school pursuant
> to this section is not less than
> the resources per pupil in all
> of the schools within the district
> serving comparable grade levels.

The option could allow, for example, a district to submit their board approved budget allocations to the State Superintendent to demonstrate comparability.

H. Concentration

Section 3932 of the Consolidated Regulations requires that for "each student receiving services under ESEA, Title I or the Educationally Disadvantaged Youth Program, the district shall verify a minimum allocation from combined categorial funds (including Title I and state programs) of 50% of the average per student expenditure excluding categorical funds in elementary schools in California. Total categorical aid funds allocated for each student shall not exceed 80% of this average."

The Instructions for Comprehensive Program Planning (1.5.10) amplify the requirement set forth in the consolidated regulations.

> . . . many schools with educationally disadvantaged students are eligible for more than one categorical source. In particular, a number of schools will have Early Childhood Education, Educationally Disadvantaged Youth, and ESEA Title I funds. Funds from these sources are combined through district decisions in a manner that satisfies the minimum and maximum levels of expenditure per student. . . . Any combinations which do not violate eligibility requirements of individual funding sources are permitted.

The "Special Instructions for the Consolidated Application" specify that the SEA has decided to supplant the 50%-80% standard with specific dollar figures. The acceptable range of expenditures per pupil receiving categorical aid is $350 - $550. The same methodology used under the 50%-80% range described above applies with respect to the $350-$550 standard.

The significance of this requirement as it relates to the federal supplement, not supplant and equitably provided provisions is analyzed in Part III.

I. Needs Assessment

The consolidated regulations (§3927) and various other state documents stress the importance of the needs assessment in the design of EDY programs. The consolidated regulations require that a comprehensive needs assessment be conducted at each school encompassing, at a minimum, each program design component (described below under "program design"). The district is also required to consolidate all of the individual school needs assessments constituting a comprehensive district needs assessment.

The Application forms and instructions prescribe in detail the elements of a needs assessment for both the school and district level needs assessment. The needs assessments must contain, among other things, information concerning base line data on student population, ability or achievement measures of the student population, data on affective areas of student development, data on psychomotor areas of student development, appraisals of levels of social and cultural understanding within the student population, and appraisal of the extent to which needs exist that relate to the other required program components e.g., staff development.

J. Program Design

The Instructions for the School Level Plan require that every EDY project have the following components:

- reading
- language development
- math
- staff development
- parent/community participation
- health/auxiliary services
- multi-cultural education
- bi-lingual/bi-cultural education

Districts are permitted to request a waiver from this requirement if such a waiver is justified by the district/school level needs assessment or by funding limitations.

The Consolidated Regulations make reference to the following required program components:

- parent and community involvement (§3930)
- staff development (§3933)
- multicultural education (§3936) and
- reading, language and math (§3928)

In addition, the Consolidated Regulations require that programs funded through the Consolidated Regulations must be planned to "facilitate the attainment of goals" established as part of their comprehensive plan.

Programs designed under the Consolidated Application may not "sanction, perpetuate or promote the segregation of students on the basis of race, ethnicity, religion, sex or socio-economic status " [(§3935(a)) of Consolidated Regulations].

The Consolidated Regulations (§3931) require the use of an individualized instruction approach in schools maintaining programs under the Consolidated Application.

In addition to the above requirements, the SEA includes a three-year longitudinal requirement ensuring that children stay in a special program for a minimum of three years and a requirement specifying the qualifications of compensatory education staff.

K. Program Evaluation

Section 3929 of the Consolidated Regulations requires that all EDY projects be evaluated annually "in a form and manner determined by the Superintendent of Public Instruction." Districts are required to report the results of such evaluation to the parent advisory councils.

L. Coordination

Section 3926 of the Consolidated Regulations requires LEAs to account for all funding resources when developing their comprehensive plan. In addition, each participating school must develop its own plan. The California thrust is definitely towards encouraging a coordinated use of all possible funding sources to develop the most efficient program. Specifically, these regulations provide:

> Each school district maintaining categorical aid programs shall develop a comprehensive district plan to meet the identified educational needs of participating students. Each school receiving categorical funds shall develop a comprehensive program plan for students who will receive additional services from these funds. This comprehensive plan shall account for all resources, regular as well as categorical, available for providing services to the participating students.

M. Parental Involvement

Section 3930 of the Consolidated Regulations requires that

> school districts maintaining programs under this Chapter

> shall involve parents, teachers and community representatives in the planning, implementation and evaluation of their comprehensive programs.

LEAs are required to establish a District Advisory Committee (DAC) and School Advisory Committees (SAC) at each school participating in EDY and other special state programs.

The parental involvement requirements in the Consolidated Regulations that apply to EDY programs also provide, among other things, that

- On all advisory committees, parents of participating students not employed by the LEA must constitute more than a majority of the voting membership;
- LEAs are required to provide training opportunities for members of advisory committees;
- The Consolidated Application must contain a certification by the DAC and SAC chairpersons that the committees participated in the planning of the program.

N. Recordkeeping and Reporting

The Consolidated Regulations require that districts,

- shall develop records in accord with the California School Accounting Manual (§3943) and
- keep such records as are necessary to verify accuracy of reports submitted (§3940).

Districts have a general obligation under §3940 of the Consolidated Regulations to "submit such reports and at such times as the Superintendent shall require . . . ." In addition LEAs are to submit,

- reports in accord with the California School Accounting Manual (§3943);
- evaluation results (§3929); and
- maintenance of effort evidence (§3937).

O. Access to Information

Section 3940 of the Consolidated Regulations specifies that upon the request of the Superintendent of Education LEA records shall be made available "for inspection to verify the accuracy of reports and to determine the conformity of program activities to the applicable program plans."

There is no mention of citizen access to EDY records.

P. Information Dissemination

There is no mention of this requirement in the EDY legislation or regulations.

Q. Additions

Waiver

The Consolidated Regulations allow for the granting of a waiver by the State Board of Education if a local school district can demonstrate that the lack of such a waiver would "prevent the orderly implementation of comprehensive education programs in that district" (§3925). A waiver can be granted from the provisions of either the consolidated regulations or the Education Code.

III. Administrative Functions

A. Introduction

Many of the administrative functions included in the Title I legal framework are also included under EDY. Set forth in the EDY legislation, the General Education Provisions of the California Education Code or the Consolidated Regulations are the following functions: application approval, rule making, monitoring, technical assistance, financial management, information dissemination, reporting, and program evaluation.

The state especially stresses what it calls "MAR" which is an acronym for "monitoring and review." The state personnel interviewed constantly stressed the importance of this procedure in facilitating the design and implementation of high quality programs. The specific aspects of "MAR" are described *infra*. under "monitoring and technical assistance."

As explained *supra*., Title I is *not* administered as a separate program but as one of several funding sources constituting a comprehensive program plan. Thus, state personnel responsible for overseeing Title I are also responsible for overseeing, among other things, the EDY and ECE programs.

B. Application Approval

Section 6473 of the California Education Code specifically grants the State Board of Education the power to "approve, withhold approval of, or disapprove of any program of compensatory education." California has exercised this authority through the adoption of a consolidated application process which is authorized under §3940 of the Consolidated Regulations. As explained supra this single application includes a comprehensive plan describing how the school or district intends to expend funds from various sources including Title I, EDY, and ECE.

California's consolidated application includes both a district level and school-site application. When the Consolidated Application was originally developed, only the district level application was submitted to the SEA while school level plans were kept on file at the district office to be reviewed by SEA staff during monitoring visits. California responded to criticism from OE that the district plan did not contain sufficient information for Title I application approval purposes, by requiring that school-level plans for Title I and EDY schools be submitted to the SEA so that they may be reviewed for compliance with Title I and EDY legal requirements.

In order to determine whether a school district has complied with the various Title I as well as EDY program requirements, the SEA has developed several sets of instructions. For example, there exists a document explaining how to develop a comprehensive Program Plan, instructions for completing the comprehensive school program plan, a comprehensive school-level program plan form with additional instructions (for elementary programs and a separate form for secondary schools), and a document entitled, "Management Information and Requirements for Programs Funded Through Consolidated Applications."

Part III of this paper will analyze the practice of utilizing a single application form for state compensatory education as well as Title I.

C. Rulemaking

The EDY statute explicitly requires the State Board of Education to "adopt regulations setting forth the standards and criteria to be used in the administration, monitoring, evaluation, and dissemination of programs submitted for consideration." (§6499.236) In addition, the General Provisions of Chapter 6.5 of the State Education Code require the State Board of Education to adopt rules and regulations necessary to implement the provisions of the chapter. This broad grant of rulemaking authority has been exercised in the Consolidated Regulations and in numerous policy setting materials. The California SEA has not been hesitant to exercise their rulemaking authority.

D. Interpretation

There is no specific mention of this function in the California Education Code, but it is clear that a rulemaking function as strong as that granted to the California State Board of Education would imply the right to interpret.

E. Monitoring

Section 6499.236 of the EDY legislation specifically requires the State Board of Education to set forth standards and criteria to be used in the monitoring of EDY programs. This monitoring function is carried out utilizing a state developed comprehensive monitoring document. Monitoring and Review (MAR) is viewed as both compliance and quality oriented. There is no statement in the Act or Consolidated Regulations concerning the amount of monitoring that is required or desirable.

Monitoring visits focus on all funding sources on the consolidated application. One major impetus for the recently increased number of MARs conducted is the need for the SEA staff to review ECE funded schools to determine continuation of funding. (See Technical Assistance for further discussion).

F. Technical Assistance

Section 6467 of the General Provisions of the State Compensatory Education Chapter of the State Education Code lists the giving of technical and consultative services as one of the duties of the State Compensatory Education Director. This function has been assumed by the Elementary Education Unit.

Technical assistance -- quality control visits are seen as a very important function of the state education office. One major impetus for such visits is California's Early Childhood Education Program which requires that program quality be closely monitored.

The SEA personnel are constantly conducting Monitoring and Review visits (MAR) in the districts assigned to them. The staff utilizes a monitoring instrument and reviews EDY, Title I and ECE as well as other programs during a MAR visit.

The staff may utilize three different instruments during a MAR: 1) Program Quality Review Instrument; 2) District Level Program Compliance Review Instrument; and 3) School Level Program Compliance Review Instrument. The two compliance oriented instruments contain specific items dealing with compliance with EDY requirements.

G. Enforcement

There is no specific mention of this function in the EDY statute, the Consolidated Regulations or the State Education Code General Provisions.

H. Financial Management

Section 3943 of the Consolidated Regulations requires that districts "maintaining programs under this Chapter shall develop budgets, account records, claims for reimbursement and reports in accordance with the California Accounting Manual." In addition, LEAs are required to develop "auditable records" to document compliance with federal and state regulations. However, under the existing statutory framework the California State Department of Education does not possess the authority to conduct a compliance audit whereby it is determined whether EDY funds are being expended in accordance with state rules and regulations.

I. Grant Distribution

EDY is an entitlement program with funding dependent on characteristics of individual districts.

J. Program Evaluation

The Superintendent of Public Instruction is required under Section 6499.237 of the EDY legislation to submit an annual report to the Governor and the legislature evaluating the programs established under EDY.

K. Recordkeeping and Reporting

The EDY statute (§6499.237) requires the Superintendent of Public Instruction to submit an annual report to the Governor and to each House of the Legislature evaluating the programs established under the EDY program.

There is no SEA recordkeeping requirement mentioned in the EDY statute or Consolidated Regulations.

L. Complaint Resolution

There is no mention of this function in the state Education Code General Provisions, the EDY statute or the Consolidated Regulations.

M. Information Dissemination

Section 6499.236 of the EDY legislation requires the State Board of Education to set forth standards and criteria to be used in the dissemination of programs funded under EDY. In addition, the duties of the Director of Compensatory Education include a clear description of the information dissemination function.

SECTION 3

EARLY CHILDHOOD EDUCATION

I. Introduction

Unlike the categorical programs, ECE is a competitive program which allocates funds through districts to individual school sites (grades K-3) to promote comprehensive reform and restructuring of the school's environment. Although the program is competitive in nature, the state legal framework requires that half of the schools to be included in any one year must be from schools serving students of greatest educational need. Continuation and expansion of ECE funding is contingent upon documented program success.

Two basic premises govern the strategy of restructuring the entire school environment for all children, not just educationally disadvantaged children and for all schools, advantaged as well as disadvantaged. First, all schools and their constituencies currently demand program reform and improvement.

Second, allocation of ECE funds to both disadvantaged and non-disadvantaged schools, with continuation and expansion of these joint allocations contingent upon program success, would build an interdependence and mutual commitment among the more and less affluent segments of the community to program improvement and accomplishment.

As explained supra., schools are required in the consolidated application to develop a comprehensive program, coordinating funds received from Title I, EDY and ECE. Many of the program requirements applicable to EDY are also applicable to ECE including, for example, needs assessment, establishing goals and objectives, evaluation, parent involvement, individualization of instruction, and comparability.

In addition, the ECE legal framework includes a provision which prohibits an LEA from discriminating or penalizing the K-3 grades in the provision of regular state and local funds.

The major policy question analyzed in this paper concerning the interrelationship between ECE and Title I is whether the Title I legal framework (especially the Title I comparability provision) should treat special reform efforts, like ECE, similar to state compensatory education programs?

This issue will be discussed infra. in Part III. Set forth below is a description of the program requirements which are unique to ECE and a brief description of the monitoring and review function.

II. Program Requirements Unique to ECE

A. Legislative Intent

The legislative intent of ECE is to restructure primary education by requiring that schools develop comprehensive plans. The objectives of the plan must include an assurance that each child will have an individualized program "to permit the development of his maximum potential." (§6445.1) Secondly, the plan must include an assurance that "all pupils who have completed the third grade of the state's educational system will have achieved a level of competence in the basic skills of reading, language, and mathematics sufficient to continued success in their educational experiences." (§6445.1)

B. Funding

ECE is a competitive grant program. During 1973-74, approximately 172,000 children in grades K-3 were ECE participants. These children attended approximately 1,000 schools in 800 school districts in the state. The $24,000,000 allocated for ECE in that year was increased in 1974-75 to $40,000,000. It is anticipated that the funding level will continue to increase until eventually all school districts and all schools at the elementary level in California with approved applications will be participating.

In order to be eligible to compete for ECE funding, a district must put together a comprehensive plan which sets forth the district's educational program on a school-by-school basis. The district determines which schools shall compete for ECE funding and in what order schools will be phased into the program.

Section 6445.7 of the ECE legislation requires that districts receiving funding under this program must insure that at least 50% of the amount allocated to the district is designated for schools which have large numbers of educationally deprived children. The state's concern for educationally deprived children is further evidenced by Section 6445.13 which provides that an additional $65.00 will be provided for each educationally deprived child in addition to the basic ECE grant of $130.00 per pupil in an ECE participating school.

It would appear that these additional funds combined with EDY program funds are utilized, in part, to accomplish the second stated objective of ECE, namely that "all pupils who have completed the third grade of the state's educational system will have achieved a level of competence in the basic skills of reading, language, and mathematics sufficient to continued success in their educational experiences" (§6445.1). This goal closely resembles one of the goals of EDY and Title I, i.e., the acceleration of educational development of children functioning below the level appropriate for their age.

Thus, for example, the document "Instructions for Comprehensive Program Planning" (§2.4.1.) explains that

> . . . for students who score below the first quartile on a standardized achievement test on a developmental assessment instrument or who have serious deficiencies in verbal functioning, additional services may be provided from the [$65] additional ECE funds allowed for educationally disadvantaged youth.

C. Supplanting/Maintenance of Effort

ECE funding is intended to be supplementary to the district effort. The state (§6445.17) requires that allowances granted under this program be given only if the fiscal effort of the district "with respect to early childhood education for any fiscal year of participation . . . was not less than the fiscal effort for that purpose for the fiscal year preceding the district's participation. . . under this chapter." This provision requires that a district's total expenditures for K-3 remain the same. Another statutory provision (§6445.18) requires that the fiscal effort per child in the primary grades not be decreased as a result of the receipt of ECE funding. This provision is similar to the Title I maintenance of effort requirement.

D. Meeting of Objectives; Index of Student Attainment

The ECE legislation provides that the SEA must provide "for an annual review of the success of each local district in meeting the objectives of its approved plan for early childhood education." (§6445.8) Furthermore, the SEA is required to adopt rules and regulations governing the termination of allowances to districts which are unsuccessful in meeting the objectives of their approved plan (§6445.8).

Section 6445.11 also provides for the relative ratings of participating schools. The SEA is required to "inform each participating district of the relative performance of their participating schools." This data must be regularly analyzed and evaluated and submitted in an annual report to the legislature.

The SEA, consistent with the above mandates, has developed to supplement its program compliance review instrument, a program quality review instrument which rates schools on a scale from 1(unacceptable) to 5(excellent).

CHAPTER 2

WASHINGTON'S PROGRAM

CHAPTER 2

WASHINGTON

THE URBAN, RURAL, RACIAL AND DISADVANTAGED EDUCATION PROGRAM

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CHAPTER 2

WASHINGTON

I. Introduction

Washington's Urban, Rural, Racial and Disadvantaged Education Program (URRD) is a competitive categorical grant-in-aid program that originally was funded in 1969 as the Urban, Racial and Disadvantaged Program. It was developed in response to the racial unrest in the urban areas of the state. A rural component was added in 1971 and in 1974 the program was given a statutory base. During school year 1975-76, thirty-nine school districts received a total of $4,972,188.00 in grant awards.

The URRD funding is distributed in five program categories. The categories and their 1975-76 allocations are as follows: 1) Re-entry Motivation ($675,512.00); Preschool Education ($591,520.00); 3) Academic Achievement ($2,490.238.00); Bilingual/Bicultural Education ($535,249.00);

and 5) Indian Education ($679,669.00). The Superintendent of Public Instruction annually establishes allocations for each of the five program areas and grants to districts are awarded on a competitive basis.

The URRD statute does not set forth goals for the programs to be funded; however, the URRD regulations which are part of the Washington Administrative Code state that "URRD programs shall be for the purpose of achieving the following goal: to provide compensatory educational services to students who are not succeeding in schools because of disadvantaged, minority, or poverty backgrounds -- in order to raise their level of educational attainment to the level appropriate for children of their age. " (WAC 392-161-005).

The phrase "educational attainment" is defined in the regulations broadly to refer to areas of "cognitive or academic achievement, increased attendance, reduction in dropout rates and disruptive behavior, as well as to student attitude toward self, others, and the community." (WAC 392-161-010).

The five program categories will be discussed in detail under the program requirement section. The following is a brief description of the thrust of each category. It should be noted that the URRD program includes categories which may be considered "compensatory education" as the term is defined in this paper (see supra.) as well as bilingual and bicultural programs.

- Reentry Motivation: programs designed to return non-attending students to school programs and improve their academic achievements with the goal of graduation or employment. Students with high dropout potential may also be served.
- Preschool Education: programs designed to serve economically disadvantaged students (2 1/2 to 5 years old) with the goal of establishing a strong educational foundation to equip students for successful school participation.
- Academic Achievement: programs designed to serve low-achieving, economically disadvantaged or educationally alienated students and programs which involve parents or community resource persons in the educational process.
- Bilingual/Bicultural Education: programs designed to help students who are educationally or socially disadvantaged by virtue of their national or ethnic orgin and the resulting deficiency in the English language. The program thrust is on acquisition of academic skills and cultural awareness although the category includes programs with a bicultural rather than linguistic thrust.
- Indian Education: programs designed to serve urban and rural Indian children who are disadvantaged by reason of economic, cultural, or academic deprivation.

The state requirements with which an LEA must comply in order that its proposal be eligible for approval by the SEA are minima There are no school attendance area eligibility or targeting requirements; nor are there any concentration requirements.

With respect to which children may participate in URRD programs, the state regulations generally specify that at least 50 percent of the program participants must satisfy the general eligibility criteria. For example, under the academic achievement program, at least 50 percent of the students served must be achieving below grade level on a standardized test.

In short, state and local personnel interviewed indicated that they consider the components of the URRD program which are "compensatory" in nature to be broader in scope than Title I and consequently URRD programs theoretically may focus on needs not met by Title I and on children who are not "educationally deprived." For example, an LEA could legally design an URRD program to meet the needs of "disruptive children" regardless of their level of educational attainment.

It should be noted that several of the LEA personnel interviewed explained that although URRD funds may be used for non-educationally deprived children, such funds are often used only for children who are "educationally deprived."

The URRD program is administered out of the same division as Title I. The administrative staff consists of a Program Supervisor and a secretary. Additional staff are called upon during the period when applications are reviewed. Outside contractors are utilized to complete the required program evaluations.

The URRD legal framework does provide that the URRD supervisor must "monitor" project activities. However no mention is made concerning the authority to audit URRD programs (financial management) or employ specific sanctions with respect to non-complying LEAs (enforcement).

II. Program Requirements

A. Introduction

The URRD statute specifically mentions the following program requirements: citizen participation and program evaluation.

The URRD regulations contain reference to the following program requirements: coordination; needs assessment; agency recordkeeping and reporting; LEA eligibility; maintenance of effort; program design; private agency participation; and program evaluation.

Set forth below is a brief description of the program requirements applicable to LEAs competing for URRD grants.

B. School District Eligibility

The Washington Administrative Code (WAC 392-161-030) states that the Superintendent of Public Instruction is authorized to accept and fund program requests from any public or private agency that is not prohibited from receiving or using public monies by the operation of other laws. In reality, parochial schools do not participate in URRD due to State Constitutional restrictions although several private non profit groups have been solicited by the superintendent to submit proposals in special areas. Grants are given through a competitive process. (See Application Approval)

C. Attendance Area Eligibility and Targeting

URRD has no attendance area eligibility or targeting requirements. The local school districts are free to develop proposals in one or more of the five program categories and submit them for funding. Programs are placed in particular attendance areas or developed as district-wide efforts at the *discretion* of the LEA. This fact combined with the competitive nature of the program raises questions concerning whether a LEA can demonstrate that it is distributing URRD funds to school attendance areas in the district on an equitable basis *without* regard to whether or not they are also eligible to receive assistance under Title I. This issue is analyzed *infra*, in Part III in the section concerning the supplement, not supplant and "equitably provided" requirements

D. Child Eligibility and Targeting

The goal statement in Washington's regulations (WAC 392-161-005) indicates that services should be offered to students "who are not succeeding in school because of disadvantaged, minority, or poverty backgrounds in order to raise their level of educational attainment to that level appropriate for children of their age." The phrase "educational attainment" is defined in the regulations to include areas of "cognitive or academic achievement, increased attendance, reduction in dropout rates and disruptive behavior, as well as student attitude toward self, others, and the community." (WAC 392-161-010)

Each of the five URRD program categories is designed to serve a particular type of student. The child eligibility criteria are as follows.

- Reentry Motivation Programs are to serve "students who have not graduated from high school and for one reason or another are no longer enrolled in a K-12 public school program." (WAC 392-161-080)

- Preschool Education Programs are to serve "economically disadvantaged students (2 and 1/2 to 5 years old) in order to better equip them for successful school participation." The regulations require that at least fifty percent of the children enrolled in URRD preschool programs must come from families whose incomes are at or below $9,000. This additional requirement would seem to be unnecessary in light of the statement that the goal of the category is to serve economically disadvantaged students (see program description, page 92). It is unclear whether in all program categories, a program designed to serve the group mentioned in the regulations can then be opened to other students.

- Academic Achievement Programs are to serve children who

  1. are achieving below grade level on a standard achievement test
  2. are disadvantaged by virtue of low academic achievement
  3. give substantive evidence of becoming severely alienated from the standard educational approaches common to their district or
  4. are economically disadvantaged according to HEW poverty guidelines.

The regulations require that at least fifty percent of the students served under this category must be achieving below grade level on a standardized test.

- Bilingual/Bicultural Education Programs are to serve those children who because of their national or ethnic origin are educationally or socially disadvantaged by virtue of their deficiencies in the English language skills. Again, the regulations set a minimum participation standard. At lest fifty percent of the children participating in programs to help children overcome a dual language handicap must be children for whom English is not their dominant language. This category includes bicultural programs.

- Indian Education Programs are designed to serve urban and rural Indian children who are disadvantaged by virtue of economic, cultural, or academic deprivation. For this category of programs at least sixty percent of the children participating in such URRD programs shall be children who identify themselves primarily as Indian.

As can be seen from reading the above eligibility requirements, a wide range of students can legally be served under URRD. The population to be served by Title I is actually a subset of the population that can be served by URRD. For instance, it appears that under an "Academic Achievement" program 50 percent of the participating children may be functioning at or above grade level. Further, the LEA could design a program for disruptive children or children who are becoming alienated from the educational process regardless of whether they are functioning below grade level.

Under the bilingual/bicultural component, a program could be designed to give all fifth graders an appreciation of Spanish heritage so long as English is not the dominant language of at least 50 percent of the program participants. The fact that Title I and URRD may serve different student groups is important for purposes of the comparability reporting requirement and with respect to comprehensive program planning. These issues are analyzed *infra*. in Part III.

It should be noted that several of the SEA and LEA personnel interviewed explained that although the URRD legal framework permits LEAs to design "compensatory education" programs (as opposed to the bilingual/bicultural components of URRD) which include children who are *not* educationally deprived, the programs actually designed often include *only* children who are "educationally deprived." The implication of this factor is analyzed as well *infra*. in Part III.

E. General Aid

There is no mention of this requirement in the URRD statute or regulations although the descriptions of the five categories do use the term "programs designed for" which indicates that the programs are to benefit a designated population.

F. Supplanting

There is no mention of this requirement in the URRD statute. However, the regulations contain language indicating that URRD monies should not be used as a substitute for existing local support for "school programs but must be utilized for the development of new programs, for extension of present programs, or as a supplement to financial resources secured by a school district from other than local sources." (WAC 392-161-065). The requirement is not developed further in the application or in the state descriptions of the program.

G. Comparability

There is no mention of this requirement in the URRD statute or regulations.

H. Concentration

No mention of this requirement in the URRD Statute or regulations.

I. Needs Assessment

There is no mention of this requirement in the URRD statute. Needs assessment is mentioned in the regulations under the heading of "basic selection criteria" where it is indicated that reviewers of project applications should determine whether the needs of target populations have been fully documented and then clearly addressed by the program application. The requirement is not developed in other materials.

J. Program Design

There is a great deal of freedom in URRD to design programs to meet whatever need has been identified by the district. The state materials describing the URRD program stress the breadth of program design options available under URRD regulations.

Each of the program categories contains examples of the types of programs that could be funded under the particular category. In addition WAC 392-161-050 indicates that programs are to be developed that relate to existing or planned programs to meet the needs of students in the district.

K. Program Evaluation

There is no mention of an evaluation requirement in the URRD Statute. The descriptions of the five program categories in the URRD regulations contain a section labeled "evaluation of effectiveness" that sets forth the minimum standards for evaluation for effectiveness of each type of program. The standards are quite minimal and do not indicate the type of test to be used for evaluation purposes. As an example, the Academic Achievement Programs evaluation section reads as follows: "As measured on whatever achievement instrument is deemed appropriate by the project staff and the superintendent of public instruction, the group average of the raw scores of students enrolled in academic achievement programs for more than six months will increase.

The application form requires the LEAs to set forth their measurable program objectives and then indicate how they will measure whether those objectives have been reached.

L. Coordination

The URRD statute specifies that priority for URRD funding shall be given to programs which involve interdistrict cooperation and/or coordination with federal funding.

WAC 392-161-050 encourages school districts to "use other sources of financial support to complement the provisions of the URRD grant and to develop appropriate relationships to the total school programs." The application (page 5c) requires LEAs to describe the linkage between their URRD proposal and any other programs which focus on the same problem.

Another aspect of coordination is represented by WAC 393-161-065 which requires that where several categorical aid sources are focused on children in an URRD program, funds from sources other than URRD should be expended first where it is possible. In addition, any underexpenditure "shall be credited to the URRD program unless written arrangements to the contrary are made with the superintendent of public instruction."

The significance of this state provision requiring that sources other than URRD should be expended first "where it is possible" as it relates to the Title I legal framework, especially the coordination and supplement, not supplant provisions is analyzed infra.in Part III.

M. Parental Involvement

URRD does not have a parent involvement requirement similar to Title I. The URRD statute does indicate that the legislature is concerned that the target group affected by any proposed program should be involved in program planning and the statute states specifically that "no programs of a community-wide nature shall be approved without significant involvement in program development by that community." (§28A.41.280)

The URRD regulations simply repeat the legislative concerns mentioned above. The URRD requirement is for citizen participation and there are no specific guidelines concerning what that involvement should include. In discussing model URRD programs the regulations indicate that a model advisory committee would hold meetings regularly and be "continuously involved in program planning and evaluation" (WAC 392-161-150(5)(a) and (6).) The application assurances require that the applicant have a project advisory committee which includes parents, educators and related youth agencies. (p. 1-a).

N. Recordkeeping and Reporting

There is no mention of these requirements in the URRD statute.

The URRD regulations require each program grantee to prepare and submit the following three evaluation reports: an implementation report, a mid-year and a final report. In addition the Common School Provisions of the Washington Education Code give the Superintendent specific authority to require such reports as may be necessary to carry out his duties. (§28A.41.170) Furthermore, WAC 392-161-160 requires that URRD programs maintain specified records for a period of two years.

O. Access To Information

There is no mention of this requirement in the URRD statute or regulations.

P. Information Dissemination

There is no mention of this requirement in the URRD statute or regulations. The application form requests the locals to describe the means they will use to disseminate information about the proposed program. (p. 5c).

III. Administrative Functions

A. Introduction

The URRD program is administered by one professional who utilizes other state personnel and consultants as needed for application review and evaluation.

Nine of the twelve Title I administrative functions are mentioned in either the URRD statute or regulations. They are application approval, rulemaking, monitoring, technical assistance, interpretation, evaluation, information dissemination, recordkeeping and reporting.

As will be seen in the following descriptions, these functions are generally not well developed in either the URRD statute or regulations.

B. Application Approval

The URRD statute authorizes the State Superintendent of Public Education to receive and "fund program requests submitted by and operated by any public or private agency..." (§28A.41.270.) The URRD Rules and Regulations specify that the funds will be granted to local school districts on a competitive basis. The regulations specify both the review process to be followed in determining which applications the superintendent should fund and also the basis on which the review committee should judge the applications.

URRD proposal applications are to be reviewed according to the URRD program category into which they fall. The proposals are first reviewed by a 3-5 person committee which then makes a report to the URRD state advisory committee in conjunction with the superintendent's staff. The report indicates whether the review committee recommends acceptance of the proposal, acceptance with modifications or rejection. The URRD state advisory committee then accepts, modifies or rejects the review committee's report and forwards their recommendations to the Superintendent of Public Instruction through the URRD Supervisor. The Superintendent is then free to accept or reject the recommendations of the advisory committee.

The selection criteria set forth in the regulations for the guidance of the proposal review committees focus primarily on the areas of needs assessment, evaluation, community involvement and impact on children served.

In the second year of operation, URRD funding is required by regulation to be cut by 10% unless the program is a model one[74]. The regulations set out the criteria that must be met in order to be classified as a model program. (WAC 392-161-150(5).)

Local school districts apply for URRD funds on a standard project application.

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[74] The regulations provide that a program may be considered

The issue of comprehensive program planning when one funding source to be coordinated is competitive in nature and another entitlement is discussed in Part III of this paper

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(footnote continued from previous page)

"model" if it exhibits the following characteristics: The program must have met or exceeded all of its stated objectives or provided evidence that an objective was not met due to mitigating circumstances which are acceptable to the superintendent of public instruction; their product objectives shall have proven to be realistic in meeting documented needs; the measuring instruments used were valid for the target population served; the individual URRD program strategies/procedures selected were directly related to the state URRD category objectives; the comprehensive program is most effective in terms of the number of disadvantaged children served and the degree to which desirable learner outcomes were visible; the degree of parent or community support of the program was high with the minutes of the advisory committee meetings indicating:

(a) that the meetings are held regularly
(b) that advisory committee members are continuously involved in program planning and evaluation.
(c) that the program continues to serve the substantive educational needs of children.

C. Rulemaking

The URRD statute requires the Superintendent of Public Instruction to adopt and implement rules and regulations necessary for the administration of the URRD program. The statute sets out several legislative concerns that the regulations should include but does not limit the scope of the regulations to these points. (§28A.41.280).

The Common School Provisions of the Washington Education Code contain a general grant of power to the Superintendent to issue necessary regulations and make it a duty for him to do so. (§28A.41.170)

The URRD regulations do not mention the rulemaking authority of the Superintendent.

It is clear that the Superintendent has the authority to promulgate regulations for the administration of URRD.

D. Interpretation

The URRD Statute makes no mention of this administrative function. The URRD regulations specify that one of the major administrative duties of the URRD Program Supervisor shall be to "interpret URRD program policies, goals, and guidelines for school district superintendents, local project managers, advisory committee members and other interested parties." (WAC 392-161-025(1)).

E. Monitoring

The URRD Statute does not mention this administrative function. The URRD Regulations give the responsibility to the URRD supervisor to "monitor project activities." (WAC 392-161-025(5)).

The URRD administrative office has recently developed a monitoring form for use in performing this function.

F. Technical Assistance

The URRD Statute states that the superintendent shall "have the duty to assist school districts who service urban, rural, racial, and disadvantaged populations in the formulation of total school programs that meet the needs of this population, including the development of programs to be financed through urban, rural, racial, and disadvantaged funds." (§28A.41.290).

The duty of the superintendent is therefore broader than simply giving technical assistance in URRD related areas such as program management and proposal writing.

The URRD Regulations give the Program Supervisor the responsibility for "organizing and implementing technical assistance workshops and conferences"for local URRD project personnel and others. (WAC 392-161-025(6)). This regulation appears to limit the technical assistance duty from the broad comprehensive planning thrust of the statute to a more narrow duty to offer assistance to URRD project personnel and "others." The term others is not defined.

G. Enforcement

Neither the URRD Statute nor the URRD regulations mention any enforcement scheme for dealing with a local school district that violates one of its assurances to the superintendent or that does not abide by the rules and regulations set forth in the Washington Administrative Code.

H. Financial Management

There is no mention of a financial management function in the URRD statute. The regulations indicate in WAC 392-161-040 that URRD programs will operate on a quarterly reimbursement method. The application form contains five pages devoted to gathering budget information including a section that enables districts to indicate a variety of funding sources including Title I that might be funding a total program.

As mentioned under coordination WAC 392-161-065 requires that when several categorical aid sources impact children in an URRD program, the funds from other sources shall be expended first where possible and any under-expenditure shall be credited to URRD unless otherwise specified.

A summary description on the URRD program developed in the State Education Office contains a paragraph on fiscal management that states that fiscal accountability is seen as a key characteristic of URRD programs.

I. Grant Distribution

As explained supra, URRD is a competitive program. The program Supervisor has the responsibility under the URRD regulations to "review, negotiate, and set funding levels for all project proposal applications." (WAC 392-161-025). In addition the Superintendent of Public Instruction is required by statute to submit "to each regular session of the legislature a programmed budget request for urban, rural, racial and disadvantaged education programs (§28A.41.250) and this includes setting the authorized amounts for each of the URRD program categories.

J. Program Evaluation

The URRD statute requires that all programs be independently evaluated on a biennial basis and that "no program shall be funded for more than two years unless the objectives of the program have been substantially achieved or are in the process of being achieved." (§28A.41.280).

The URRD rules and regulations specify minimum standards for the evaluation of effectiveness of each of the five URRD program categories. For example, the minimum expectation for a preschool education program is that at least 75 percent of the children enrolled in the program for more than six months will attain the participant achievement objectives set forth in the program's related proposal application." (WAC 392-161-095).

The regulations also set forth the guidelines to be followed in selecting the external or third party evaluators whose responsibility it is to evaluate URRD programs biennally.

K. Recordkeeping and Reporting

The URRD statute does not contain specific recordkeeping or reporting functions to be performed by the SEA.

The URRD regulations do specify that the URRD supervisor has the responsibility for preparing an annual URRD progress report for the State legislature. (WAC 392-161-025).

L. Complaint Resolution

There is no mention of this function in the URRD statute or regulations.

M. Information Dissemination

The URRD statute contains no reference to this administrative function.

The URRD regulations specify that one of the duties of the URRD Program Supervisor is to "respond to intra-agency and external URRD program information requests. (WAC 392-161-025(3)).

CHAPTER 3

MICHIGAN'S PROGRAM

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CHAPTER 3

MICHIGAN

CHAPTER THREE PROGRAM

I. Introduction

Michigan has funded a state compensatory education program since 1965. Early programs were not seen by state officials as particularly successful and in 1971 with the strong support of the State Superintendent of Education, the Michigan legislature approved Section 3 of the State School Aid Act. Section 3 (now Chapter 3) was a performance based compensatory education program. The districts receiving funding were required to submit a proposal including a commitment to increase the achievement level of the students served by one year's growth for one year's participation in the program. The emphasis at the state level was on evaluation not program design. A district's future allocation under Chapter 3 was to be based on the success a district had in meeting its stated objectives (penalty provision).

The penalty provision of Chapter 3 was never put into effect, however, since the local school districts succeeded each year in convincing the legislature to pass a "forgiveness" amendment or grant an option that allowed unsuccessful districts to receive unearned funds by promising to make changes in the design of their Chapter 3 program. The State School Aid Act of 1975-76 completely eliminated the performance based aspects of Chapter 3. The view in 1971 was that the state did not care how locals used their Chapter 3 funds as long as they could show results. As a result, the evaluation requirement has always been of central importance, and therefore well-developed. Thus, for example, every child must be pre- and post-tested, subject to certain specified exceptions.

Today, the Education Department is considering requesting application approval authority for the State Office so that the SEA can exercise some control over program design.

As amended, the Chapter 3 effort is basically a categorical aid program for educationally deprived children that distributes money to districts based on the percentage of educational deprivation in the district as determined through an annual state-wide assessment program. Private School children are not eligible to participate in Chapter 3 programs.

Chapter 3 was originally funded at $22,500,000 which allowed monies to be granted to sixty-seven eligible school districts to serve 112,500 children.

Once the Chapter 3 entitlement is determined for a school district, the LEA may design and implement Chapter 3 programs in any school attendance area in the district, i.e., there are no school attendance area eligibility and targeting requirements. However, the Chapter 3 regulations require that participants must be selected on the basis of "extraordinary need for special assistance in the basic cognitive skills." (R388.222(1))

Furthermore, the regulations limit the total number of program participants who may receive Chapter 3 services by providing that "the total number of pupils identified to be funded as program participants shall not exceed" the number of children on which the allocation is based.

Chapter 3 is designed to "enable eligible districts to establish or to continue, in conjunction with whatever federal funds may be available to them from the provisions of Title I of Public Law 89-10, the Elementary and Secondary Act, as amended,. . . comprehensive compensatory education programs designed to improve the achievement in basic cognitive skills of pupils enrolled in grades K-6 who have extraordinary need for special assistance to improve their competencies in such basic skills and for whom the districts are not already receiving additional funds by virtue of their being physically, mentally, or emotionally handicapped." (Section 31 of the State School Aid Act of 1975-76)

The regulations for Chapter 3 indicate that the program is designed to improve communication and computational skills of children in grades 2 to 6 who score one or more years below grade level on a standardized achievement test instrument. Pupils in grades K-1 may be served if the need for additional help is indicated either by the results of a standardized readiness instrument or in the judgment of the school teacher or official.

In order to ensure that Chapter 3 funds are used to provide supplementary services, the state legal framework includes a supplement, not supplant provision and a comparability provision which generally ensure that Chapter 3 funds are not used to replace funds "for regular instructional activities for identified pupils." The Chapter 3 statute also sets $200.00 as the maximum amount of state compensatory education funds that may be expended on a participating child. However, the state legal framework does not prohibit an LEA from supplementing this $200.00 with additional Title I funds. In fact, the state legislation includes a section which provides that an LEA must use Chapter 3 funds to supplement and not supplant the use of federal funds. (§36(2))

The Chapter 3 statute and regulations contain almost no reference to the administration of the program. Except for a general statutory provision requiring the State Board of Education to "promulgate rules necessary to implement this act" (The State School Aid Act §398.1107) it would appear that the program is designed to be self-executing.

The Chapter 3 effort is administered by a Coordinator, a secretary and two professional technicians. The Chapter 3 and Title I staff are both administratively located in the Compensatory Education Services unit. The consultants responsible for monitoring Title I programs are theoretically responsible for monitoring Chapter 3 programs during on-site visits to local school districts, although it is not clear how much specific attention is given to the Chapter 3 program during these monitoring and review visits.

The administrative framework of Chapter 3 is not viewed as ideal by some of the staff in the State Department of Education. Presently there is a movement within the State Department to gain more application approval authorization for Chapter 3. The addition of two professional technicians to the Chapter 3 staff was the result of discontent with the current level of monitoring and enforcement of the programs. It should be noted that prior to the 1975-1976 school year when a second section was added to the application the state office did not keep on file or require to be submitted a description of the Chapter 3 program. The absence of program descriptions meant that it was only through on-site visits that the SEA could determine whether Chapter 3 programs were being designed consistent with legislative intent.

II. Program Requirements

A. Introduction

The Chapter 3 statute and regulations mention the following "Title I type" program requirements: comparability; concentration; coordination; child eligibility and targeting; needs assessment; general aid; parent involvement; supplanting;

recordkeeping; reporting; program design; district eligibility; and evaluation. There is no mention of access to information, information dissemination, or attendance area eligibility and targeting.

B. School District Eligibility

Chapter 3 is a categorical aid program in which districts become eligible to receive funds based on the number of their K-6 pupils determined to be in need of "substantial improvement in their basic cognitive skills." (§32, State School Aid Act). The annual statewide assessment test is used to identify the number of such pupils. Students who attain 40% or fewer of the math or reading objectives on the test are counted for district eligibility.

To be considered eligible, a district must have at least 15% of its K-6 enrollment and not less than 30 pupils identified as in need of improvement.

Funds are distributed to districts in decreasing order of concentration of eligible students with each identified eligible pupil generating $200. However, the Act does contain a hold harmless provision so that a district which received funds in 1974-75 and would have not received them in 1975-76 because of a lower percentage of identified eligible students was still granted 50% of the amount received in 1974-75. Money for these "hold harmless" districts is available because the Act also limits to 10% the increase in funds that a district can receive over the previous year's allocation.

Although Chapter 3 and Title I utilize two different mechanisms for computing the funds due to a district, this difference creates no problems in terms of the legal relationship of the two programs. This conclusion is explained *infra*. in Part III.

Chapter 3 has no "*maintenance of effort*" provision.

C. *Attendance Area Eligiblity and Targeting*

Chapter 3 has no attendance area eligibility or targeting requirements. LEAs may distribute the money to any of their schools which have eligible students enrolled. Completed applications indicate that locals serve as few as five or as many as several hundred students in a single school. Michigan favors this approach since it is believed that under this system money can get to the educationally deprived child directly without concern for the socio-economic status of the school attendance areas as prescribed by the Title I legal framework.

The lack of school attendance area eligibility and targeting provisions in relationship to the Title I provisions requiring that Title I project areas not be penalized in the distribution of state and local funds, including compensatory education funds is discussed infra. in Part III.

D. Child Eligibility and Targeting

The Chapter 3 statute specifies that program participants are to be selected from "the lowest achievers in basic cognitive skills" in grades 2-6 and from "among those with the lowest readiness for the acquisition of cognitive skills" in grades K and 1 (§35(i)(e)). This provision does not require that the lowest achievers be targeted but only that the district select from among the lowest. This provision is in contrast with the Title I focus on serving children with the greatest need first. Under the Chapter 3 statute a district could decide that children who scored below a cut-off point would not be served or a district could serve some but not all children at the lowest percentile and then move on to serve the next highest group.

The regulations state that participants must be selected on the basis of "extraordinary need for special assistance in the basic cognitive skills (R 388.222(1)).

Pupils in grades 2-6 are considered to meet this need criteria if 1) they score 1 or more years below grade level in computation or communication skills on a standardized test; 2) they demonstrate mastery of 40% or fewer of the reading or math objectives on the statewide assessment battery or 3) if neither 1 or 2 is available, it is the attested (emphasis added) judgment of the school teacher or school official that the pupil needs such assistance.

Pupils in K-1 are considered eligible based on the attested judgment of a school teacher or official with the proviso that available test information also be considered.

These provisions strengthen the statutory concept of selecting from the lowest achievers since for grades 2-6 a child would have to be more than one year behind grade level to be eligible. This definition is technically stricter than the Title I definition of an educationally deprived child as one who is "behind grade level". In essence then, Chapter 3 has child eligibility criteria that in grades 2-6 are narrower than Title I. Yet, in contrast to Title I, Chapter 3 has virtually no child targeting requirement, i.e., no "greatest need" requirement.

The implications with respect to the coordination of a state compensatory education program with Title I when key definitions are not identical will be discussed in Part III in the section on comprehensive program planning.

E. General Aid

The Chapter 3 Act states that Chapter 3 monies are to be used for "comprehensive compensatory education programs designed to improve the achievement in basic cognitive skills of pupils enrolled in grades K-6 who have extraordinary need for special assistance to improve their competence in such basic skills. (§31). The regulations make even more clear that the Chapter 3 programs are to be "for the benefit of identified pupils". (R 388.230) Chapter 3 monies are therefore not to be used for general aid purposes.

F. Supplanting

Section 31 of the Chapter 3 statute speaks of designing programs for pupils who have extraordinary need for special assistance in order to improve their competencies in basic skills; this stated purpose indicates that Chapter 3 funds are intended to provide over and above services. Rule 9 of the regulations states clearly that Chapter 3 funds are not to "be used to supplant funds for regular instructional activities for identified pupils." (R 388. 229). In addition, the application form contains an assurance that "Chapter 3 funds will be used to supplement and not supplant local funding of activities for eligible children in Chapter 3 programs."

Interestingly, the Act also specifically provides that "a district shall use the state funds for specifically identified students to supplement and not supplant the use of federal monies" (§36(2)). On its face, this provision seems to require a layering of funds on an eligible student in a Title I/Chapter 3 school so that the child receives more funds than he would have under only a Title I program.

Part III of this paper contains a discussion of the application of the Title I supplanting provision to state compensatory education programs.

G. Comparability

One of the eligibility requirements for Chapter 3 funds is that the districts "show evidence of having established comparability among the schools within their boundaries in accordance with standards established by the state board. (Act, Sec. 35(1)(b)).

Regulation 388.228 specifies that to demonstrate comparability a district must have satisfied the Title I comparability requirements.

H. Concentration

Chapter 3 regulations specify that "the total number of pupils identified to be funded as program participants shall not exceed the number determined in Chapter 3, Section 33(c) of the Act." Therefore, a school district may only serve a number of students equal to the number on which their allocation was based.

Section 31 of the Act sets an upper limit of $200 from state funds that may be expended per eligible pupil participating in a compensatory education program. These statutory and regulatory provisions taken together would appear to assume that Chapter 3 funds will be spent on a limited number of students.

The Chapter 3 statute specifically allows combinations of state and federal funds and since the upper limit for expenditure of Chapter 3 funds is $200, the regulations appear to encourage districts to fund services for identified students from Chapter 3 as well as Title I. This concept of joint funding, i.e., the funding of a compensatory education effort by more than one funding source, is discussed in Part III of this paper

I. Needs Assessment

The Act requires that LEAs identify the pupils to be served thereby implying that some type of needs assessment will occur (§35(e)). The regulations specify the methods that may be used to determine program participants. (R388.222)

In addition, Rule 4 (R399.244) requires the administration of a pre and post test to each program participant. The regulations allow the use of objective criterion referenced tests and specify that locals may administer such tests as a diagnostic-prescriptive instrument throughout the year. This indication that locals are expected to monitor the progress of their Chapter 3 students is also present in the program description section of the Chapter 3 application where locals are asked the type of student monitoring system that will be used for Chapter 3 students.

In short, the term needs assessment is not used in either the Chapter 3 statute or regulations. The purposes of the needs assessment implied in the statute and regulations are: 1) to identify program participants and(2) to monitor progress of program participants.

J. Program Design

The original Section 3 concept gave free rein to local school districts to use whatever methods they wished in order to raise the achievement level of their Chapter 3 students. The aim of the program was to effectuate positive results and the performance based funding mechanism was seen as a way to motivate districts to get results through their own innovative programs.

Although the performance based funding mechanism is no longer in use, the Chapter 3 regulations still give little guidance as to the type of programs that should be designed. The monies may only be used to improve the basic cognitive skills of the Chapter 3 pupils but there are few guidelines as to what types of activities are allowed to be funded. The Act states in §36 that district use of the money may include but is not limited to the following:

- Employment of additional personnel.
- Purchase of instructional devices and other aids.
- Leasing of portable classrooms.
- Contracting with a public or private agency, a group of employees or a group of non-employees.
- Providing in-service training for teachers and other personnel.
- Providing adequate nutrition and health care to students.

This section also states that a district may use monies received under the Act in "any manner which in the judgment of its board and its staff contributes significantly toward substantial improvements in the basic cognitive skills of the pupils. (§36(1)).

The regulations (R 388.230) require that..."funds received by a local school district for programs conducted under Chapter 3 of the Act shall be spent on programs for the benefit of identified pupils." In addition, the regulations require that the application include a commitment by the district that "its minimum performance objective shall be an increase in achievement equivalent to 1 year's growth as specified in the performance objectives. . ." (R 388.223).

The descriptive section of the Chapter application is basically a checklist accomodating a wide range of delivery systems.

Part III of this paper contains a discussion of possible methods districts could use to develop a single compensatory education program jointly funded by Chapter 3 and Title I.

K. Program Evaluation

The present Chapter 3 legal framework retains a strong evaluation requirement even though the performance based funding provisions are no longer operative. Section 37 of the Act requires that each Chapter 3 participant be pretested and post-tested as a condition for receiving Chapter 3 funds. Several exceptions to this requirement are provided under the provision.

This individual reporting on each participant sets up a more rigid evaluation framework than Title I and created some problems in past years when children were required to be kept as program participants for 3 years. The 3 year requirement was designed, among other reasons, to allow longitudinal evaluation studies. At the school level, however, program supervisors were forced to pre and post test children to whom they no longer offered services and then fill those program slots with more educationally deprived children.

Since the Act specifies that the Department of Education has the authority to either administer or approve for administration the tests used for evaluation, state staff has authority to hold up the release of funds to LEAs until a satisfactory evaluation design has been developed for the proposed program.

The most practical method of funding a coordinated Title I and Chapter 3 program, given the more demanding evaluation requirements included under Chapter 3 is discussed _infra_. in Part III.

L. _Coordination_

Section 31 of the Chapter 3 statute states that Chapter 3 funds are to be used "to establish or continue, in conjunction with whatever federal funds may be available . . . comprehensive compensatory education programs . . . ." There is no other mention of a coordination requirement in the statute or the regulations.

M. _Parental Involvement_

The Act states that to be eligible to receive Chapter 3 monies a district must have "committed themselves to the involvement of parents, teachers, and administrators in the planning and continuous evaluation of their compensatory education programs . . ." (§34(1)(c)). The regulations specify that the Chapter 3 application must include a "description of the method of involvement of parents, teachers, and administrators." (R 388.223).

This requirement is not developed as fully as in Title I and it appears that a single PAC often serves those schools funded both with Title I and Chapter 3 monies. Since Chapter 3 does not set out the specifics of PAC involvement, such a dual purpose PAC would be set up to satisfy Title I requirements.

N. Recordkeeping and Reporting

There is no mention of these requirements in the Chapter 3 statute.

The regulations require that "an attested list of pupils identified as program participants shall be available in the local school district office after the fourth Friday after the official membership count day." (R 388. 222(d)(5)).

Section 388.231 of the regulations requires that LEAs receiving Chapter 3 funds file "an annual evaluation, a Chapter 3 expenditure report and other reports in the form prescribed by the department."

O. Access to Information

The Chapter 3 statute and regulations make no mention of an access to information requirement. The Chapter 3 application, however, contains an assurance to be signed by the LEA that the LEA will "keep such records and afford such access thereto as the state educational agency may find necessary . . . ."

P. Information Dissemination

No Chapter 3 requirement.

III. Administrative Functions

A. Introduction

As previously mentioned, the Chapter 3 State School Act and implementing regulations contain minimal reference to the administrative functions to be performed by the Chapter 3 state office. The statute and/or regulations mention or imply the following functions: rulemaking, application review; evaluation; grant distribution; and reporting. The official job description for the Chapter 3 coordinator contains specific reference to or implies the existence of the following functions: information dissemination; technical assistance; monitoring, reporting; rulemaking; interpretations; and enforcement. These functions are not "developed" in other materials. It should be noted that Chapter 3 is administered with relatively few written materials.

The following functions are not mentioned at all in the Chapter 3 statute or regulations: information dissemination; interpretation; monitoring; financial management; complaint resolution; enforcement and technical assistance. The job description for the Chapter 3 Coordinator does, however, indicate that he is expected to perform the following duties: 1) make quality control and compliance visits to compensatory education projects (enforcement); 2) be involved in in-service education and general public relations (technical assistance); 3) consult with local school districts concerning the implementation of Chapter 3; and 4) respond to letters and telephone calls from lay citizens, public school personnel and government officials (information dissemination).

B. Application Approval

Chapter 3 is basically an entitlement program. As described supra., districts receive an allocation based on the concentration of identified eligible students in their district. At the present time, districts which are to receive funds submit applications to the Chapter 3 State Office. The applications are first reviewed in the compensatory education office and then sent to Research, Evaluation and Assessment Services (REAS) where they are reviewed for evaluation plans. The staff in REAS will contact the local school district if they do not agree with the evaluation plan that has been set up for the program. The application will not be approved and money released until REAS is satisfied with the evaluation component of the proposed program.

The compensatory education office has no mechanism by which they can reject an application for any of the following reasons: a lack of program planning, potential general aid violations, or dissatisfaction with the equipment to be purchased with Chapter 3 monies. The only time that the department has any leverage to insist on changes in the application is when a district has experienced a large degree of program failure. Section 36(2) of the Chapter 3 statute states that if a district has less than 40% of its pupils achieving gains of 75% or greater than that district must change its delivery system and submit its program for the approval of the Department of Education. This provision allowed the department to exercise its approval function for only one school district during school year 1975-76.

Prior to the 1975-76 school year the application form designed by the department did not include a descriptive section. The 1975-76 application, for the first time included information describing the type of program that was to be implemented on the local level.

Section 388.223 of the state regulations specifies the six required components for each application.

The Chapter 3 staff has recommended to the State Board of Education that legislative changes be sought that would grant the Department approval authority over Chapter 3 programs in buildings where fewer than 75% of the pupils achieved less than 75% of the previous year's program objectives. (staff paper -- Critical Issues Confronting Chapter 3 of the State School Aid Act and Recommendations for Action, January, 1976). It is interesting to note that the proposed amendments would focus attention on school buildings and not districts. In addition, the rationale for the suggestion ties application approval to technical assistance.

The Title I application approval function is significantly different than that granted to the SEA under the Chapter 3 statute and regulations. In Part III of this paper we will discuss whether it is possible to consider a state program similar to Title I if the program does not grant to the state office the authority to approve or disapprove the application for funds.

C. Rulemaking

The Chapter 3 statute requires the state board to "promulgate rules necessary to implement this act" (§388. 1107). The State board has promulgated regulations to govern Chapter 3 and the primary responsibility for administering regulations, guidelines and rules is given to the Chapter 3 Coordinator as evidenced by his job description.

The Act includes the term "rules" whereas the Chapter 3 coordinator's job description speaks of "guidelines" and "rules." Note that in Michigan, the State Board of Education promulgates formal regulations; there are no other written materials comparable to the Office of Education's handbooks.

D. Interpretation

There is no mention of this function in the Chapter 3 statute or regulations.

E. Monitoring

There is no mention of this function in the Chapter 3 statute or regulations although the job description for the Chapter 3 Coordinator indicates that he is expected to make compliance visits to compensatory education projects.

F. Technical Assistance

Again, this function is not mentioned in the Chapter 3 statute or regulations but the Chapter 3 Coordinator's job description requires that he make quality control visits to compensatory education projects.

G. Enforcement

The Chapter 3 statute and regulations do not set up an enforcement scheme.

H. Financial Management

There is no mention of this function in the Chapter 3 statute and regulations.

I. Grant Distribution

This function is implied in the Chapter 3 statute and regulations. The State Department of Education, in conjunction with the Coordinator's office determines the amount that each local school district will receive annually.

J. Program Evaluation

As discussed above in the Chapter 3 requirements section, there is a strong evaluation thrust to the Chapter 3 program. The SEA actively assists local school districts to make sure that they are capable of fulfilling their evaluation requirements. The statute and regulations do not require the state department of education to conduct independent evaluation efforts although the state evaluation personnel are actively involved in evaluation projects which go beyond the scope of their required function.

K. Recordkeeping and Reporting

The Chapter 3 statute requires that the State Board of Education shall report to the governor and the legislature by October 1 of each year on the results of the evaluation studies conducted under Chapter 3 programs. The Chapter 3 coordinator's job description also includes the responsibility to draft reports to the superintendent of public instruction, the State Board of Education, and the compensatory education unit director.

There is no mention in the statute or regulations of a SEA recordkeeping function.

L. Complaint Resolution

The Chapter 3 statute and regulations make no mention of this function.

M. Information Dissemination

There is no mention of this function in the Chapter 3 statute or regulations. The Coordinator's job description indicates, however, that his responsibilities include responding to letters and phone calls from citizens, public school personnel and government officials.

CHAPTER 4

FLORIDA'S PROGRAM

CHAPTER 4

FLORIDA

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CHAPTER 4

FLORIDA

I. Introduction

In 1973, the Florida State Legislature, recognizing that a substantial amount of Title I funds would be impounded by the federal government, enacted a state compensatory education program.[74] The basic purpose of the special state legislation was to ameliorate the consequences of the reduced level of Title I allocations by enabling the affected districts to continue program services at the previous year's level through utilization of the special state funds in conjunction with Title I monies.

In general, the state legal framework provided that LEAs were to design and implement a single compensatory education program which complied in every respect with the Title I regulations and guidelines. In other words, state compensatory education funds were to be used to make up for losses of Title I funds. For purposes of this paper, such a state effort will be categorized as a "Title I add-on" program.

This state compensatory education was only funded for the year of the impoundment. State personnel do not anticipate

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74 / During the summer of 1977, Florida repealed the legislation described above. In its place, the State enacted the Florida Compensatory Education Act of 1977.

refunding of the program in the near future. Although no longer funded, the Florida program does raise several questions concerning the relationship between Title I and state compensatory education legislation. Set forth below is a more detailed description of the state compensatory education legal framework and the key issues raised by the state legislation.

II. Description of Florida's Program, Including Key Issues Raised by State Legal Framework

Section 236.081(2) of the Laws of Florida authorizes the addition of compensatory education funds to supplement the base student cost determined under the Florida Finance Program plan. The supplement shall be given for "all full-time equivalent students in basic programs qualifying for compensatory education in accordance with criteria . . . established by regulations of the state board." The statute specifies that "such regulations shall be designed to maintain consistency with applicable federal laws and regulations so as to prevent impairment, interruption, or loss of any federal funds allocated to the state for compensatory education of public school students."

Set forth below is a summary of the regulations promulgated by the State Board. First, with respect to the allocation of state compensatory education funds, the regulations specify that such funds will be allocated to local school districts based on a count of low-income students as defined in Title I. However, for the year in question, the total received by a district from Title I and state funds "shall not be less than the district received from Title I for the previous year."

In other words, the regulations were designed to distribute the state funds in a manner that would minimize the effects of large Title I reductions. Thus, the local school districts' basic grants were determined, in part, by the level of Title I funds received.

Second, with respect to the design of programs, the state regulations provided:

> - Funds available to each district for compensatory education shall be combined to support a single program. This program shall follow the USOE current guidelines for ESEA Title I . . .
> - Districts shall submit a single application.

In other words, the state guidelines prescribe the development of a single program designed and implemented consistent with all Title I requirements to be funded from Title I and the state compensatory education program. The implications of such a scheme are discussed infra. in Part III as part of our analysis of comprehensive program planning of Title I and state compensatory education programs.

A final issue raised by Florida's program concerns the relationship between Title I and a state program where the child eligibility criteria are dissimilar. According to Florida's compensatory education statute, students qualify for compensatory education "in accordance with criteria, including low achievement test scores, socio-economic level, and low standard English comprehension level, established by regulations of the state board" (§236.081(2)). Although the regulations, as promulgated, specify that Title I child eligibility criteria will be utilized in selecting program participants, the statute clearly left open the possibility that socio-economic level could be taken into account in determining eligibility. Such a position would raise a question of how the state program and Title I would operate in a coordinated fashion in a district and whether a single application could be used when the SCE program has child eligibility criteria significantly different from Title I. Part III discusses the issue of comprehensive planning/coordination between two programs with differing child eligibility criteria. The issue of the use of a single application to apply for Title I and SCE funds is also discussed in Part III.

The decision as to whether to include or exclude state compensatory education funds for purposes of demonstrating comparability where the state compensatory education funds are allocated only to project area schools is discussed _infra_, in Part III.

CHAPTER 5

MARYLAND'S PROGRAMS

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CHAPTER 5
MARYLAND

I. Introduction

The Maryland School Code includes provison for two supplementary programs, although only one program is currently funded. Both programs are administered out of the Division of Compensatory, Urban and Supplementary Programs (CUSP). CUSP is also responsible for the administration of Title I.

II. Density Aid

Section 128B of Article 77 of the Public School Laws of Maryland authorizes a payment of $75.00 per pupil to any county with a population density exceeding 8,000 per square mile. Baltimore City is the only school system which qualifies to receive funding. In fiscal year 1974, it received 9.1 million dollars.

The legislation, which is one paragraph in length, contains two requirements. The first requirement provides that two-thirds of the amount appropriated under this section must "be used to provide compensatory programs for students with special educational needs resulting from educational or economically disadvantaged environments."

There are no restrictions concerning the expenditure of the remaining one-third of the allocation.

The second requirement provides that the LEA must "submit plans to the State Superintendent of Schools for his approval outlining the uses to which such compensatory funds are to be put."

III. Disadvantaged Children Program

This description is based on Chapter 7A of Article 77 of the Public School Laws of Maryland. Sections 106A, 106B and 106C of Chapter 7A authorize the State Board of Education to establish compensatory education programs of the following types: (1) teacher training for education of disadvantaged children; (2) research and consultative projects to assist LEAs in carrying out their responsibilities under the Act and (3) evaluation, demonstration and dissemination of findings related to programs of compensatory education.

To date, this legislation has not been funded due to State budget constraints. At the time of the Legal Standards survey, CUSP had not begun to draft regulations for the program. The following description will highlight the program requirements and administrative functions included in the legislation and will be followed by an analysis of the potential programmatic conflicts with Title I that could occur if the program was operational.

The Disadvantaged Youth legislation mentions the following program requirements: child eligibility; needs assessment; supplanting and coordination. The following administrative functions are also mentioned: application approval; technical assistance; and rulemaking.

The Act (§106A) defines a disadvantaged youth as a person between the ages of three and eighteen who "because of environmental conditions is not achieving scholastically commensurate with his potential abilities." The definition also requires that to be considered a disadvantaged youth a student must be "potentially capable of successfully completing" a regular educational program leading to graduation from a secondary school but not without "special efforts on the part of school authorities directed to the positive stimulation of his potential...".

The definition of the population of children eligible to participate in the program maybe inconsistent with the definition of the term "educationally deprived children" included in the Title I regulations. Part III of this paper discusses the significance of this difference with respect to the operation of the exclusion from comparability for state programs which are similar to Title I.

It is difficult to predict how the regulations would interpret the Act since the legislation indicates a concern that the State program and Title I be coordinated.

The legislation requires that every application for state funds must include a comprehensive compensatory education plan and that the program planned "have as an ultimate goal the teaching of...children to read, awakening the child's interest in learning, giving the child a sense of success in school achievement, preventing the child's alienation from the school, and preventing his possible early departure from school." (§106B(c)).

CHAPTER 6

PENNSYLVANIA'S PROGRAMS

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CHAPTER 6

PENNSYLVANIA

I. Introduction

The Pennslyvania School Code describes two programs which are intended to assist LEAs in (1) meeting the needs of specified target populations including educationally deprived children and (2) lessening the fiscal burden of school districts with high concentrations of low-income families. The first program provides state assistance to LEAs applying to the federal government for grants containing a requirement that the recipient provide matching funds. The second program provides property tax relief for selected school districts.

Although neither program is considered by the state as constituting a compensatory education program, program descriptions are included so that the reader may understand the full range of statutory schemes adopted by the states.

II. Education for the Disadvantaged

Since 1965 the Pennsylvania Legislature has annually appropriated funds under the Education for Disadvantaged Program "to provide grants to school districts to assist in meeting the matching requirements of federal grants for education of the disadvantaged where such programs meet the criteria established by the Department of Education."

The regulations promulgated by the Education Department specify that the monies may be used as matching funds in applying for the following federal programs: Day Care; Adult Basic Education; Head Start; Neighborhood Youth Corps; Follow Through; and Vocational Education. The projects proposed must hold a "reasonable promise of meeting a significant educational need of disadvantaged children and/or adults." [Regulations 54-813(d)]. The state funds may be used for up to 10% of the total program cost.

The regulations contain no guidelines for distribution of the funding and it appears that annually there is an attempt made to reduce allocations across the board when the requests for funds exceed the funds available. One-half of the money is generally distributed to Pittsburgh and Philadelphia and the remainder to other districts and intermediate districts. LEAs apply for grants on a standardized form and the allocations are made by personnel in the state Title I office. The allocation for 1975-76 was one million dollars which funded thirty-four projects serving approximately 10,639 children and 200 adults.

II. Payments On Account Of Poverty-Special Assistance Grants

Sections 2502.3 and 2502.4 of the Pennsylvania Code authorize what are commonly referred to as the poverty and super-poverty payments. The Payments on Account of Poverty provision (§2502.3) authorizes the payment to school districts of $165.00 for each low-income student residing in the district. The Special Assistance Grants (§2502.4) provide for the payment of an additional $30-$150 per low-income child to those districts with high concentrations of low-income students. The statute specifies that the State Commissioner of Education shall determine the number of low-income children in the same manner as provided under the Federal Elementary and Secondary Education Act of 1965.

In 1974-75 a total of $115,000,000 was expended for both programs. Approximately one-third of the children counted as low-income resided in Philadelphia.

The legislative history indicates that these payments were designed to enable districts with high concentrations of low-income pupils to lower their property tax rate. The money is not earmarked for compensatory education programs and the program's only relationship to Title I is the utilization of the Title I mechanism for determining the count of low-income students. For purposes of Title I, these funds would be considered state general aid to the school district since they are not mandated to be used for supplemental educational services for educationally deprived children.

PART III

ANALYSIS OF THE RELATIONSHIP BETWEEN TITLE I AND SELECTED SCE PROGRAMS

PART III: ANALYSIS OF THE RELATIONSHIP BETWEEN TITLE I AND SELECTED SCE PROGRAMS

INTRODUCTION TO PART III

Part III of this paper analyzes the relationship between selected SCE programs and specific requirements included in the Title I legal framework.

The first chapter in Part III analyzes the relationship between selected SCE programs and the Title I comparability provisions. The second chapter analyzes the relationship between SCE programs and the Title I supplement, not supplant and equitably provided provisions.

The third chapter analyzes the relationship between selected SCE programs and the Title I requirements pertaining to the eligibility and targeting of areas and children. The final chapter analyzes the relationship between selected SCE programs and the Title I coordination requirements.

CHAPTER 7

TITLE I COMPARABILITY REQUIREMENTS AND STATE COMPENSATORY EDUCATION

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CHAPTER 7

TITLE I COMPARABILITY REQUIREMENTS AND STATE COMPENSATORY EDUCATION

I. Introduction

Title I funds must be used for programs and projects which are designed to meet the "special educational needs of educationally deprived children." Title I funds cannot be expected to meet the "special" needs of these children if school districts discriminate against them in providing regular school services.

In recognition of the above premise, the Title I legal framework includes several interrelated provisions which prohibit such discrimination. [75] The application of these provisions to state compensatory education (SCE) [76] funds, however, requires particular consideration since Congress has created some exceptions for these special state programs.

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[75] All of these Title I requirements are described and analyzed in detail in a separate book prepared by the Project entitled "An Analysis of the Basis For and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act" (1977).

[76] While we use the abbreviation SCE, the term is intended to include locally-funded, as well as state-funded, compensatory education programs.

This chapter discusses the application of the Title I comparability requirement to the distribution of SCE funds. A subsequent chapter discusses SCE programs and other Title I anti-discrimination provisions--the supplanting prohibition and the requirement that state and local funds be "equitably provided" to Title I areas.

II. Overview of the Fundamental Provisions and Purposes of Federal Legal Framework

A. The Basic Comparability Provision

The comparability provision, §141(a)(3)(C) of the statute, ensures that state and local funds will be used to provide services in Title I project area schools which are "comparable," i.e., approximately equal, to services provided to children attending non-project area schools:

> State and local funds will be used in the District of the [LEA] to provide services in project areas which, taken as a whole, are at least comparable to services being provided in areas in such district which are not receiving funds under this title. [Emphasis added.]

The regulations issued by OE include specific criteria for determining comparability. [77] Under the regulations in effect during our interviews, both of the following conditions must be met:

1. The number of children enrolled per instructional staff member (including both certified and non-certified personnel) for each Title I school must not be more than 105 percent of the average number of children per instructional staff member in non-Title I attendance areas. Instructional staff members include, among other persons, teachers, principals, librarians, guidance counselors, and aides.
2. The amount of State and local money spent on each child enrolled in a Title I school for instructional staff salaries must not be less than 95 percent of the money spent per child in all non-Title I schools in the district.

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[77] 45 C.F.R. §116.26(c)(1974). The revised regulation have retained these two standards. See §116a.26(e)(1) and (2), 41 FR 42921 (September 28, 1976).

The regulations in effect during our interviews also provided that if an LEA has one school that is not comparable with respect to either of the above criteria, the LEA must collect and report data on instructional materials and supplies for the entire school district. Each Title I school must then be comparable according to all three criteria--ratio of pupils to instructional staff, per-pupil expense for instructional salaries, and per-pupil expense for instructional materials and supplies.[78] Under the revised regulations, the LEA must file with the SEA a statement of specific policies and procedures adopted by the SEA to ensure that instructional materials and supplies are provided to project and non-project area schools on a comparable basis.[79]

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[78] 45 C.F.R. §116.26(c)(1974).

[79] §116a.26(h)(3), 41 FR 42922 (September 28, 1976).

B. Relationship Between Comparability and State Compensatory Education and Other Special Programs Prior to 1974

Prior to 1974, LEAs were required to include SCE funds in their comparability calculations. Responding to a letter from a state which was developing a state compensatory education program, OE wrote:

> You also asked whether or not State compensatory education funds could be disregarded in determining the comparability of services provided in Title I areas with State and local funds with the services provided with such funds in non-Title I areas. Under the statute (Section 141(a)(3)(C)) all State and local funds must be included in such determinations; State compensatory education funds, therefore, cannot be disregarded in determining the comparability of schools serving areas designated for Title I projects.

C. The Education Amendments of 1974

1. Statutory Language

The 1974 Education Amendments changed this. In a provision stating that Title I may pay only for the "excess costs" of programs and projects, Congress indicated that the definition of excess costs excludes expenditures for "comparable State or local special programs for educationally deprived children."[80] The House Report accompanying the Amendments added that LEAs may exclude from their comparability computations funds used in these "comparable" SCE programs.

> defining 'excess costs' to exclude State and local spending on . . . compensatory education programs also affects the comparability requirement under Title I. Local school districts -- at their option -- may thereby delete expenditures for these purposes from their computations in determining whether their state and local expenditures on education are at least the same in Title I schools as in non-eligible schools.

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[80] . . . excess costs means those costs directly attributable to programs and projects which exceed the average per pupil expenditure of a local educational agency in the most recent year for which satisfactory data are available for pupils in the grade or grades included in such programs or projects (but not including expenditures for any comparable State or local special programs for educationally deprived children or expenditures for bilingual programs or special education for handicapped children or children with specific learning disabilities, if such expenditures for bilingual education and special education are used to provide, to children of limited English-speaking ability and handicapped children, and children with specific learning disabilities who reside in Title I project areas services which are comparable to those provided to . . . in non-project areas. [§403(17) of P.L. 81-874, as amended.]

It is unfortunate that the statute uses the same root word to express two distinct concepts, but so long as the distinction between "comparable" SCE programs and "comparability" computations is recognized and references to each concept are clear, no analytical problems are raised by this dual usage.

The phrase "comparable State or local special programs for educationally deprived children," which is found in the 1974 Amendments, refers to SCE programs that have characteristics similar to Title I programs. In the revised regulations OE has identified four characteristics which SCE programs must have in order to be deemed "comparable" to Title I. These four characteristics are examined at length in subsequent sections of this chapter. The familiar comparability requirement, on the other hand, which antedates the 1974 Amendments, concerns the manner in which services paid for with state and local funds are distributed to Title I and non-Title I project areas.

For purposes of clarity this paper substitutes the term "similar" for "comparable" in referring to SCE programs having the four characteristics identified in the revised regulations. No change in meaning is intended by this substitution; it is solely to facilitate convenient communication by avoiding confusing dual usage of the same root word. Adopting this convention, then, it is proper to say that funds used for SCE programs similar to Title I may be excluded from Title I comparability computations.

2. Purposes of the Education Amendments of 1974

The Conference Committee Report accompanying the 1974 Amendments stated that the purpose of excluding funds used for similar SCE programs from the definition of excess costs and LEA comparability computations is to encourage the development of these programs.[81]

> The purpose of this amendment is to *encourage* State and local spending on programs . . . *for the educationally deprived* . . . *and not to deny them Title I funds* if they are using non-federal funds for those purposes. [Emphasis added.]

The following example, concerning California's Educationally Disadvantaged Youth (EDY) program, illustrates the problem addressed by the 1974 Amendments.

The EDY program is an SCE program which distributes funds to schools *according to educational criteria*. Title I funds are distributed to schools according to *economic criteria*. Thus, some schools which receive EDY funds might be *ineligible* to receive Title I funds. Assume in the illustration below that

1. Schools A and B have above average concentrations of children from *low income families* and are, thus, eligible to receive Title I funds while schools C and D have below average concentrations

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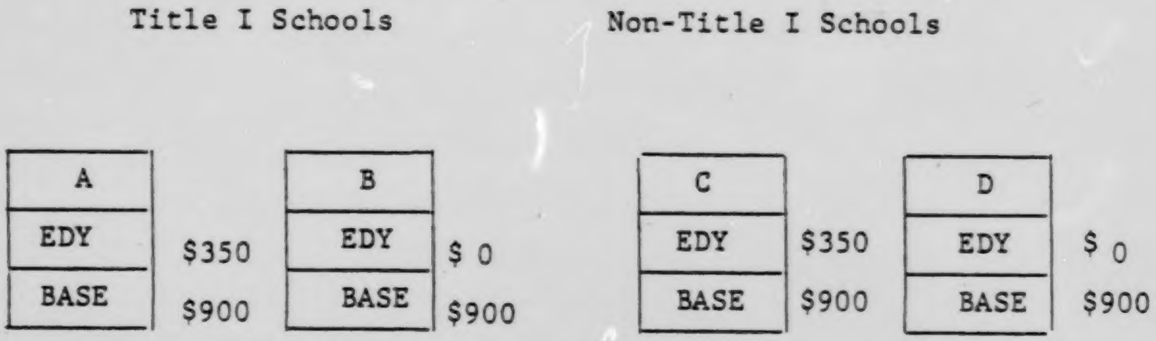
[81] It should be noted that although the language of the statute indicates that LEAs *must* exclude expenditures under comparable state or local programs, the legislative history indicates that the LEAs should be given the option as to whether or not to exclude such expenditures. OE regulations (*infra*) implement the policy set forth in the legislative history.

of such children and are ineligible to receive Title I funds.

2. Schools A and C have the same number of educationally deprived children and have more such children than schools B and D. B and D have the same number of educationally deprived children.

3. All schools are the same size and receive the same base of state and local funds ($900 per pupil per school).

4. $350 per pupil in EDY funds are available if only the educationally deprived children in schools A and C are served. Serving B and D as well would spread the EDY funds too thinly to be effective. Thus, the LEA wants to serve only schools A and C under the EDY program.


Title I Schools
Non-Title I Schools
A
EDY
$350
BASE
$900
B
EDY
$ 0
BASE
$900
C
EDY
$350
BASE
$900
D
EDY
$ 0
BASE
$900

If the LEA distributes its EDY funds as it desires, and the EDY funds are included in Title I comparability computations, Title I school B will not be comparable to the average non-Title I school. [82]

This example illustrates the following general principle: If SCE funds are included in Title I comparability computations, and if the use of SCE funds in non-Title I areas significantly raises the non-Title I average per pupil expenditure, then the comparability requirement will most likely [83] be violated with respect to any Title I school that does not receive SCE funds. The simplest way for an LEA to ensure that the comparability requirement is met where SCE funds are included in the comparability computations is to require that all Title I schools receive SCE funds.

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[82] Recall that comparability is determined by comparing each Title I school with the non-Title I average (with a five percent permissible variance). The non-Title I average per pupil is $1,075, that is, ($900 + $350 + $900) ÷ 2. When this figure is multiplied by 95 percent the standard for determining comparability is $1,021.25, i.e., the LEA must expend at least $1,021.25 per pupil in each Title I school. It is clear that the Title I school receiving EDY funding is comparable (school A receives $1,250 per pupil). However, school B ($900 per pupil) which does not receive EDY funding is non-comparable.

[83] Of course, if each Title I school not receiving SCE funds were to receive a disproportionately favorable share of base funds, a comparability violation could be avoided.

The present legal framework does not require that LEAs use SCE funds in all Title I project area schools before an SCE funds are used in non-Title I schools. The legal framework only ensures that a school would not be subjected to discrimination in the distribution of SCE funds simply because it is a Title I school. If SCE funds are limited and some non-Title I schools are left out, some Title I schools may be left out as well, so long as no discrimination against Title I schools occurs.[84]

Thus, the 1974 Amendments allow LEAs to exclude SCE funds from comparability computations. Not all SCE programs are covered by the exemption; only funds for SCE programs that are similar to Title I qualify for exclusion.[85]

The remainder of this chapter discusses the characteristics which SCE programs must have to be deemed similar to Title I and therefore eligible for exclusion from LEA comparability computations. Ancillary issues concerning SCE funds and comparability are also discussed--the focus of the comparability exemption on the actual use of SCE funds, rather than the language of SCE legal provisions, procedures for ensuring compliance with the federal standards concerning SCE programs, and the desirability of exempting other types of state and local programs from comparability computations.

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[84] To ensure that such discrimination does not occur, the revised regulations require that all state and local funds, SCE funds included, be "equitably" distributed. This requirement is discussed in chapter 8.

[85] The statute, however, grants exemptions to a few programs that are not SCE programs. This point is discussed, *infra*, in section VI. of this chapter.

III. Characteristics of Similar SCE Programs -- The Federal Regulations Interpreting the Excess Costs Provision of the 1974 Amendments

A. The Language of the Regulations

OE regulations interpreting the statutory exclusion deem SCE programs to be similar to Title I only if they have the following four characteristics (§116a.26(j)(5), F.R. 42923 (September 28, 1976)):[86]

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[86] It is important to note that a program is not similar to Title I and therefore eligible for the exclusion based simply on its title. A state program for "compensatory education" might in reality be merely a weighting in a state formula that provides additional funds to certain districts. Such funds may not be excluded from comparability computations unless they are actually used for a program similar to Title I. This point is discussed, *infra*, in section IV of this chapter.

- the participating children are 'educationally deprived' children as defined in §116.2 of Part 116 (children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age, children who are handicapped, or children who are in institutions for neglected or delinquent children);
- the program is based on performance objectives related to educational achievement and provides supplementary services designed to meet the special educational needs of those particular children;
- the program is evaluated in a manner consistent with those performance objectives and;
- the local education agency is separately accountable for purposes of compliance with the first three conditions to the State educational agency for any State or local funds expended for such programs.

B. The First Characteristic -- The Participating Children Are Educationally Deprived As Defined in the Federal Regulations

Section 116a.2 of the revised federal regulations defines the term "educationally deprived children" to mean "children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age and children who are handicapped."

Several SCE legal frameworks provide that only educationally deprived children, as the term is defined in the federal regulations, may participate in the state compensatory education program. The Michigan Chapter 3 definition of educationally deprived children is, moreover stricter than the federal definition. The chapter 3 statute specifies that program participants are to be selected from among "the lowest achievers in basic cognitive skills" in grades 2-6 and from "among those with the lowest readiness for the acquisition of cognitive skills."

Several of the states included in our survey allow LEAs to use "state compensatory education" funds for children who are not educationally deprived. For example, under Washington's Urban, Rural, Racial, and Disadvantaged (URRD) academic achievement program, the criteria for eligibility are written in the disjunctive; that is, an LEA may serve children who have any one of the following characteristics:

(1) they are achieving below grade level on a standardized achievement test;

(2) they are disadvantaged by virtue of low academic achievement;

(3) they give substantive evidence of becoming severely alienated from the standard educational approaches common to their district; or

(4) they are economically disadvantaged according to HEW poverty guidelines.

Only the first criterion is consistent with the Title I definition. The second and third may be consistent, depending on how they are interpreted. [87] The fourth is not consistent with the federal requirement. In any event, the state URRD regulations permit 50 percent of the children participating in the program to be functioning at or above grade level as indicated by a standardized test. Such children, of course, are not educationally deprived under Title I standards.

The Florida SCE program regulations use the federal definition of educationally deprived children, but the state legislation permits the SEA to determine the eligibility of children solely on the basis of economic considerations.

Under Maryland's Disadvantaged Children Program, a "disadvantaged youth" means a youth who "because of environmental conditions is not achieving scholastically commensurate with his potential abilities." If the SEA were to interpret this statutory definition to mean, for example, that a 3rd grader is eligible for participation if he/she is functioning at a fourth grade reading level, but because of his/her potential could be functioning at a fifth grade reading level, the interpretation would conflict with the federal definition of educationally deprived children.

Under California's EDY program, a child is eligible if he/she scores below the fiftieth percentile on standardized achievement tests or has serious deficiencies in verbal functioning because of linguistic, social, cultural, or economic isolation. A child who has "deficiencies in verbal functioning," but who scores above the fiftieth percentile on a test of "verbal functioning," is not educationally deprived under the federal regulations. [88]

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[87] If, in the second, "low achievement" is interpreted to mean "below grade level" (presumably as determined by means other than a standardized test) then this criterion would be consistent. If, in the third, "substantive evidence" means evidence of below average achievement, then this criterion would be consistent with the Title I requirement.

The regulation insisting that SCE programs serve educationally deprived children--as that phrase is defined in the federal regulations--is expressly required by the statute. The statute, quoted in full, *supra* , limits the SCE program comparability exemption to "state or local special programs *for educationally deprived children*." (Emphasis added.) In describing "educationally deprived children," the Senate Committee Report accompanying the statute adopts, with insubstantial modification, the definition in the federal regulations:

> Educationally deprived children are those who need special help to perform at grade level. [89]

Thus, we conclude that the first condition established by OE (i.e., that SCE programs serve educationally deprived children as that phrase is defined in the federal regulations) is clear and consistent with the congressional language.

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[88] On the other hand, a student who scores above the fiftieth percentile on tests in mathematics, but who is below average (as determined by any means acceptable under Title I standards; see the Needs Assessment chapter of our study, *supra*., n11) in verbal functioning, *is* eligible under the federal regulations, if the Title I program addresses verbal functioning problems.

[89] Senate Comm. on Labor and Public Welfare, Education Amendments of 1974, Report No. 93-763, 93d Cong., 2d Sess. 9 (1974).

C. The Second Characteristic--The Program Provides Supplementary Services Designed to Meet the Special Educational Needs of Educationally Deprived Children

The phrase, supplementary services "designed to meet the special educational needs of educationally deprived children," has appeared in the Title I legal framework since enactment. It served as the legal basis for the Title I supplanting provisions and the comparability reporting requirement included in OE regulations and Program Guides prior to 1970 when Congress expressly added supplanting and comparability provisions to the legislation. The OE regulations use this same phrase to describe the second characteristic SCE programs must have in order to qualify for exemption from comparability. Does this mean that SCE programs must have their own supplanting and comparability provisions which are identical to the Title I provisions in order to qualify as exempt programs?

The answer, in our view, is that to be supplementary, SCE funds must at a minimum, not be used (a) to replace base funds in such a way that the non-Title I average used for comparability computations is made or kept artificially low, (b) to replace base funds in such a way that, although the non-Title I average is not improperly lowered, the base funds are distributed so that educationally deprived children receive fewer base funds than the other children in their schools, or (c) where there is pre-existing discrimination in the provision of base funds.

Any scheme which lowers the non-Title I average used for comparability purposes (problem (a), above) permits one, or more than one, Title I school to receive less than a proper share of base funds. A scheme that replaces base funds which should be used for SCE program participants and diverts them to other children in the same school (problem (b), above) is a scheme which subverts Congress's purpose in allowing a comparability exemption for SCE programs that benefit educationally deprived children. A scheme which uses SCE funds to simply make up for (or, perhaps, accentuate) existing discrimination in the distribution of base funds (problem (c), above) creates the same discrimination as a replacement lowering the non-Title I average, except for the fact that, technically, an actual replacement is not involved.

The three following examples illustrate these points, respectively. In order to present the relevant issues, the illustrations in each of the three examples employ a Title I school which receives SCE funds and Title I school which does not receive SCE funds. This is because each example presents a problem that must be avoided in order for SCE funds to be exempt from Title I comparability computations. The purpose of the exemption is to allow LEAs to operate SCE programs in non-Title I areas without having to serve all Title I areas with SCE funds first. Thus, each example illustrates this fundamental premise by including a Title I school which does not receive SCE funds.

Example 1. Use of SCE funds to replace base funds in one school and diversion of the base funds to another school.

Assume in the illustration below that

(1) there are four schools in the district--A, B, C, and D;

(2) all schools have the same number of children;

(3) half of the children in each school are educationally deprived;

(4) Schools A and B are eligible for, and actually receive, Title I funds; they have above average concentrations of children from low-income families;

(5) Schools C and D are ineligible for Title I funds because they have below average concentrations of children from low-income families;

(6) In Year I no SCE funds exist and each school receives the same per pupil base allocation;

(7) In Year II sufficient SCE funds exist to provide $400 per eligible pupil in two schools; the funds are given to schools A and C; in school C, however, the SCE funds displace base funds ($400 per eligible pupil in SCE funds displace $200 per pupil in base funds since the SCE eligible children are only half the school population; the displaced base funds are diverted to generally upgrade school D.

Year I

	A
Title I	Yes
SCE	N/A
Base	800

	C
Title I	////////
SCE	N/A
Base	800

	B
Title I	Yes
SCE	N/A
Base	800

	D
Title I	////////
SCE	N/A
Base	800

N/A = Not Available

//// = Not Eligible

Year II

	A
Title I	Yes
SCE	400
Base	800

	C
Title I	////////
SCE	400
Base	600

	B
Title I	Yes
SCE	0
Base	800

	D
Title I	////////
SCE	0
Base	1,000

As the illustration shows, the SCE funds in Year II produce a benefit for, or hold harmless, all schools except Title I school B. If the SCE funds are excluded from Title I comparability computations the result is that all the schools in non-Title I areas have their funding level raised, but the non-Title I average used for Title I comparability computations is the same as in Year I ($1,000 + $600 ÷ 2 = $800) and the discrimination against school B goes undiscovered.

It is true in this example that the average total of SCE and base expenditures in Title I areas is equal to the average total in non-Title I areas. But the Title I comparability requirement demands that state and local expenditures in each Title I school be comparable to the non-Title I average. Displacing base funds with SCE funds in non-Title I areas and then exempting the SCE funds from Title I comparability computations is a scheme which, if allowed, would permit LEAs to generally upgrade non-Title I schools while keeping the non-Title I average used for comparability purposes artificially low. An artificially low non-Title I average is a device which permits underfunding of Title I schools, school B in the illustration.

SCE funds which displace base funds are not "supplementary" as the OE regulations require and should not be exempt from Title I comparability computations. Including the SCE funds in the comparability computations, the non-Title I average in the illustration above is $900, derived as follows:

$$\frac{\$1,000 + \$600 + 1/2(\ 400)}{2}$$

$$= \frac{\$1,000 + \$600 + \$200}{2} = \frac{\$18,000}{2} = \$900$$

Including the SCE funds in the Title I comparability computations unmasks the discrimination against Title I school B. This is precisely what the basic Title I comparability requirement is intended to do and must continue to do. Permitting discrimination such as that against school B in the illustration is inconsistent with the purpose of the SCE comparability exemption.

Example 2. Use of SCE funds to replace educationally deprived children's base funds and diversion of these base funds to non-educationally deprived children in the same school.

In the illustration below, make the same assumptions as in Example 1, except for (7) substitute:

> (7) In Year II the LEA uses SCE funds to replace some of the educationally deprived children's base funds in school C and diverts those base funds to serve non-educationally deprived children in that same school; SCE funds are also provided in school A.

The illustrations are different for this example because we have to look at the distribution of funds within schools, not just to schools.

Year I

A

	Non-educationally deprived children	Educationally deprived children
Title I	/////////	Yes
SCE	/////////	N/A
Base	800	800

C

	Non-educationally deprived children	Educationally deprived children
Title I	////////	////////
SCE	////////	N/A
Base	800	800

B

	Non-educationally deprived children	Educationally deprived children
Title I	////////	Yes
SCE	////////	N/A
Base	800	800

D

	Non-educationally deprived children	Educationally deprived children
Title I	////////	/////////
SCE	////////	N/A
Base	800	800

Year II

A

	Non-educationally deprived children	Educationally deprived children
Title I	/////////	Yes
SCE	/////////	400
Base	800	800

C

	Non-educationally deprived children	Educationally deprived children
Title I	////////	////////
SCE	////////	400
Base	1200	400

B

	Non-educationally deprived children	Educationally deprived children
Title I	///////	Yes
SCE	///////	0
Base	800	800

D

	Non-educationally deprived chidlren	Educationally deprived children
Title I	/////////	////////
SCE	/////////	0
Base	800	800

N/A = Not Available

////////// = Not Eligible

In this illustration the primary beneficiaries of the SCE funds are educationally deprived children in school A and, contrary to the intent of Congress, non-educationally deprived children in school C. Of course, the latter do not actually receive SCE funds; they receive extra base funds displaced by SCE funds used for others in their own school. In this case the SCE funds in school C clearly supplant base funds previously available to that school's educationally deprived children.

OE's requirement that SCE funds be supplementary in order to be excluded from Title I comparability computations is necessary to avoid this problem, and should be interpreted as doing so. The supplement, not supplant requirement is particularly important because if the LEA were allowed to exclude the SCE funds in this example from Title I comparability computations, no other Title I legal provision would prevent the improper diversion of funds shown above from happening.

Example 3. Use of SCE Funds Where There is Pre-existing Discrimination in the Distribution of Base Funds

Assume in the illustration below that

(1) there are four schools in the district--A, B, C, D;

(2) all schools have the same number of children;

(3) half of the children in each school are educationally deprived;

(4) Sufficient SCE funds exist to provide $400 per eligible pupil in two schools; the funds are given to schools A and C. Thus, schools A and C "SCE Project Schools" and schools B and D are "Non-SCE Schools".

Let us now consider the use of SCE funds in two LEAs (LEA No. 1 and LEA No. 2) where there is pre-existing discrimination in the distribution of base funds.

LEA No. 1

		Title I Schools	Non-Title I Schools	
		A	C	
SCE Project Schools	Title I	Yes	/////////////	Title I
	SCE	400	400	SCE
	Base	800	600	Base
		B	D	
Non-SCE Schools	Title I	Yes	/////////////	Title I
	SCE	/////////////	/////////////	SCE
	Base	800	1000	Base

//////// = Not Eligible

The illustration shows that in school C in LEA No. 1 SCE funds are being used to make up for a pre-existing inequity; rather than for supplementary purposes. Recall that Title I funds are not considered to be supplementary if they merely make up for an LEA's pre-existing discrimination against Title I schools in the allocation of base funds. An important mechanism in Title I designed to prevent Title I funds from being used to compensate simply for pre-existing discrimination, ensuring their supplementary use is the comparability requirement. Similarly, SCE funds which are used to make up for pre-existing discrimination against SCE project schools cannot be considered supplementary. The legislative history explaining the purpose of the Title I comparability provision is equally applicable to SCE programs:

> ...the whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of [educationally deprived] children this purpose is defeated...90 /

Moreover, the failure of SCE funds to provide such supplementary services can have a direct affect on state and local base services provided to Title I schools.

Title I is concerned because the comparability exemption allows an LEA to exclude SCE funds--if supplementary--for purposes of computing comparability. In LEA No. 1, by excluding the $400.00 in SCE funds from school C's base, the non-Title I average is lowered from $1,000 to $800.00.

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90 / Congressman Quie of Minnesota (Volume 116, Part 8, 91st Congress, 2nd Session at p. 10013).

When the SCE funds in LEA No. 1 are excluded, both Title I schools are comparable (the non-Title I average is $800.00 per pupil as is the expenditure per pupil in each Title I school). However, when SCE funds are included, school B, which is a Title I school is no longer comparable (the non-Title I average becomes $1,000 per pupil and Title I school B spends only $800.00 per pupil).

Congress intended, by including the optional exclusion, to encourage the development of programs to meet the special needs of educationally deprived children, irrespective of their residency, and not as a subterfuge for keeping the non-Title I average low.

LEA No. 2

		Title I Schools	Non-Title I Schools	
		A	C	
SCE Project Schools	Title I	Yes	////////////	Title I
	SCE	400	400	SCE
	Base	1,000	600	Base
		B	D	
Non-SCE Schools	Title I	Yes	////////////	Title I
	SCE	///////////	////////////	SCE
	Base	1,000	800	Base

////////// = Not Eligible

In LEA No. 2, the Title I schools (A and B) are receiving substantially more base funds than the non-Title I schools. As in LEA No. 1, SCE funds are being used in school C to make up for a pre-existing inequity in the distribution of base funds.

From a Title I point of view, the question is whether Title I permits the lack of comparability to be remedied by reducing the level of base support in the Title I schools? We have concluded that an LEA would violate the supplement, not supplant provision if it reduced the level of base funds in Title I schools to increase the level of non-Title I schools, in order to qualify SCE funds for the exclusion from comparability by ensuring the supplementary nature of the SCE program. The supplanting clause generally provides that Title I funds must be used to supplement the level of funds that would have been provided but for the existence of Title I and its requirements.

In sum, we have concluded that the SCE legal framework, in order to qualify under criteria two (provide supplementary services), must ensure that SCE funds are not used to make up for pre-existing inequities in the allocation of state base funds to SCE project schools provided that, in no case, may the LEA rectify the discrimination by reducing the level of base funds that would have been provided to Title I schools.

The examples above demonstrate those interpretations of OE's second condition for SCE comparability exemption which are necessary to ensure both that the intent of Congress in granting the exemption is not defeated and that discrimination against Title I schools is not allowed. In all of the above examples, the SCE funds that are not actually providing supplementary services in non-Title I areas must be included in the computation of the non-Title I average used for comparability purposes. Excluding non-supplementary funds from Title I comparability calculations would result in fewer funds having to be provided to Title I schools. (Funds provided to Title I schools must be comparable to the non-Title I average; funds in non-Title I areas excluded from the calculations lower the non-Title I areas average, thus lowering the amount of funds that need be provided to Title I schools.)

The only justification for exclusion of SCE funds from Title I comparability computations is that the exclusion serves the purposes intended by Congress in enacting the 1974 Education Amendments. In the above examples, the SCE funds, as actually used in non-Title I schools, do not serve Title I's purpose of providing supplementary services to educationally deprived children. In our view, the examples describe particular categories of problems the second condition for exemption must address.

Some SCE programs already have general anti-discrimination provisions. For example, the California EDY program and the Michigan Chapter 3 program incoude both supplanting and comparability provisions (see supra). The California consolidated regulations provide, with respect to supplanting, that:

> districts maintaining programs under this chapter shall submit evidence that the sum of local and state apportionment resources utilized in programs for participating students has not been reduced.

The California consolidated application contains an assurance to be signed by the LEA that

> the expenditure under the funding sources checked below [including EDY] will not be used to supplant local district effort.

Rule 9 of Michigan's Chapter 3 program states that SCE funds are not to "be used to supplant funds for regular instructional activities for identified pupils." In addition, the application form contains an assurance that "Chapter 3 funds will be used to supplement and not supplant local funding of activities for eligible children in Chapter 3 programs."

Regulations implementing Washington's URRD program contain language indicating that URRD monies must not be used as a replacement for existing local support "for school programs but must be utilized for the development of new programs, for extension of present programs, or as a supplement to financial resources secured by a school district from other than local sources."

Not all SCE programs analyzed by the project, however, included supplanting, comparability or equivalent provisions. For example, the Maryland Density Aid legislation does not include a specific supplanting or comparability provision. Though the legislation requires that two thirds of the Density Aid funds be used to provide "compensatory programs for students with special educational needs," the state legal framework offers no specific interpretation of this phrase.

In sum, specific interpretations should be required. The second required characteristic of SCE programs (that they be "supplementary" to qualify for exemption from comparability) is essential, and OE should expressly clarify each important aspect of this requirement so that state interpretations will be consistent with federal policy.

D. The Third Characteristic -- The Program Includes Performance Objectives and Evaluation Efforts

With the exception of the Maryland Density Aid Program, all of the state legal frameworks included in our survey contain evaluation requirements.

Performance objectives and thorough evaluation are requirements necessary to ensure that SCE efforts constitute a "program" and not simply, for example, a weighting in a school finance formula. A program means an overall plan for utilization of the special funds in a manner which ensures that the purpose of the legislation is accomplished.[91] Without evaluation there would be no way of knowing the extent to which any program accomplished its purposes. The third required characteristic is, thus, a necessary interpretation of the statutory, similar program requirement and should be retained in the regulations.

E. The Fourth Characteristic -- The LEA Is Separately Accountable to the SEA for Designing SCE Programs Having the First Three Characteristics

The fourth characteristic of SCE programs qualifying for the Title I comparability exemption requires LEAs to be separately accountable to the SEA for compliance with the first three requirements. The extent of the required SEA oversight authority, however, is unclear. Must application approval, monitoring, financial management (auditing) and enforcement sanctions be included? Under a competitive grant system like Washington's URRD program is the authority to disapprove an application sufficient accountability in the absence of actual program monitoring? Does application approval constitute sufficient accountability under an entitlement program like Michigan's Chapter 3 program?

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[91] See the definition of the term "program" as defined in Title 45 of the Code of Federal Regulations with respect to federal assistance, 45 C.F.R. §100b.1 (1974).

Does "separately accountable" mean SEA authority to determine compliance or actual capability to determine compliance? Does the phrase simply mean that the SEA Title I staff must, with respect to the SCE program, undertake the above functions pursuant to the oversight responsibilities prescribed in the Title I legal framework?

The comprehensiveness of current SCE oversight mechanisms varies considerably. California requires comprehensive monitoring and review of EDY programs. The SEA has no auditing authority, however, and it is questionable whether sanctions may be imposed on non-complying LEAs.

Washington's URRD program includes no financial management or enforcement provisions although the state regulations grant URRD supervisors authority to "monitor project activities" and grant the SEA application approval responsibilities. (Application approval is a significant function due to the competitive nature of the URRD program; lack of compliance can be taken into account in deciding whether to provide funds in future years.)

The Maryland legal framework includes virtually no oversight mechanisms. LEAs are merely required to submit project descriptions to the state.

We recommend that the phrase "separately accountable" be clarified so that answers to the questions posed above are not in doubt. OE should also clarify that SEA personnel responsible for overseeing the operation of Title I are also responsible for determining that all federal requirements have been satisfied before an LEA is allowed to exclude any state or local funds for purposes of computing comparability. This conclusion is explained, infra., in the section of this chapter entitled, "Procedures for Ensuring Compliance with Federal Standards Concerning SCE Programs."

F. Policy Analysis, Conclusions and Recommendations

Under the statute SCE programs must be similar to Title I in order to qualify for the comparability exemption. We conclude that the four characteristics SCE programs must have to be deemed similar to Title I are necessary to implement this statutory exemption.

The statutory exemption reflects a compromise between two Congressional policies -- prohibiting discrimination against Title I beneficiaries, on the one hand, and encouraging SCE programs, on the other. The importance of the comparability requirement to accomplishing the first policy was explained on the House floor:

> The whole purpose of Title I is to concentrate and increase efforts on behalf of disadvantaged children because these children need more help than their more fortunate peers. Unless comparable services are provided before the application of Title I funds in schools serving concentrations of poor children this purpose is defeated.[92]

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[92] Congressman Quie, Congressional Record Volume 116, Part i, 91st Cong. 2d Session, at p. 10013. See also Part III, Chapter 10 of the Lawyers' Committee Analysis of Title I, supra., n.11.

Congress' desire to encourage SCE programs and the significance of creating a comparability exemption to accomplish that purpose were expressly discussed in Congressional reports accompanying the 1974 amendments. (Supra , at 179)

Both Congressional policies must be considered in interpreting the scope of the exemption. The exemption reflects an accommodation of each; if either policy were pursued to its logical extreme, it would negate the other.

In such circumstances it is particularly important that the terms of the compromise be clearly stated in the applicable legal provisions. We recommend some improvement in this regard.

The current statutory authority allowing an LEA, at its discretion, to exclude from Title I comparability computation expenditures made under a similar SCE program, is the proviso included in the definition of "excess costs" (supra , at 159). This provision does not include an express reference to the relationship between excess costs and comparability.

Though this relationship is clarified in the legislative history (see supra), several SEAs indicated during our interviews that they did not understand how the excess costs proviso granted them discretion to exclude similar SCE expenditures from Title I comparability computations. We recommend that the proviso be deleted from the "excess costs" definition and that a subsection explaining the exemption for SCE funds be added directly to Section 141(a)(3), which contains the comparability provision. The new subsection should specify that state and local funds expended for special programs for educationally deprived children similar to Title I, may, at the LEA's option, be excluded from determinations under the comparability provision, so long as the LEA satisfies the requirements for similar programs established by OE.[93]

This change would clarify the purpose of the exemption and emphasize the importance of OE regulations defining the precise circumstances under which the exemption is allowed.

IV. The Focus of the Comparability Exemption on the Actual Use of SCE Funds, Rather than the Language of the SCE Legal Provisions

As mentioned earlier, most SCE programs we analyzed contain components or aspects inconsistent with one or more of the four required characteristics of similar programs. Can an SCE program be partially exempt, and partially non-exempt, from comparability? Some LEAs actually use all their

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[93] By retaining the optional policy, LEAs which choose to use SCE funds in all their Title I schools would be allowed to include such expenditures. By treating this expenditure like base state and local expenditures, the Title I schools may substantially exceed the minimum equalization required by the comparability ratios. Of course an LEA must decide to include or exclude SCE funds on a uniform basis. It cannot include SCE funds in Title I areas and exclude such funds in non-Title I areas.

SCE funds in ways which meet the four requirements. Can LEAs qualify all their SCE funds for exemption by actually using the funds for similar programs, even though the SCE legal provisions authorize dissimilar as well as similar SCE programs?

OE regulations do not expressly address these issues, but considering the purpose of the SCE comparability exemption and the limited circumstances under which it may be invoked, we conclude (1) that only those particular expenditures which actually satisfy the four requirements may qualify for the exemption and (2) that all actual expenditures which do satisfy all requirements qualify for the exemption, even if the SCE legislation authorizes both qualifying and non-qualifying programs. This conclusion is reinforced by the statutory language which permits exemption for local, as well as state, programs. Local programs for educationally deprived children are less likely than state programs to be legislated, and there is no indication that Congress intended to distinguish between legislated programs and those developed by LEAs with their own funds in the absence of legislation. The focus on the actual use of the dollars, rather than on the specific terms of SCE legislation, permits all funds for qualifying SCE programs to be excluded from Title I comparability computations.

Thus, for example, if a state program labeled "compensatory" provides that at least two-thirds of the funds must be used for educationally deprived children and an LEA uses only two-thirds of its grant for educationally deprived children, then the LEA can only exclude two-thirds of its allocation.

However, where a state program requires that two-thirds of the allocation be used for educationally deprived children and the remaining one-third is discretionary, and the LEA uses all funds for educationally deprived children, then the LEA, at its discretion, may exclude its entire allocation if all other requirements are met.

This latter conclusion is of particular interest to Washington LEAs, several of which reported that they focus all of their URRD academic achievement funds on educationally deprived children as the term is defined in the federal regulations, although the state regulations authorize the use of URRD funds for non-educationally deprived children.

V. Procedures for Ensuring Compliance with the Federal Standards for "Comparable" SCE Programs

Improper use of the SCE comparability exemption entails potentially serious consequences. If funds are found to have been improperly excluded from comparability computations, the error must be corrected and the comparability ratios recomputed. If the recomputation indicates a comparability violation, the LEA must be deemed to have been out of compliance since the inception of the program. The consequence of non-compliance is total ineligibility for Title I funding.[94]

Because these consequences may be serious, it is important that proper determinations concerning the SCE comparability exemption be made prior to the expenditure of Title I funds. We recommend that LEAs desiring to invoke the SCE comparability exemption be required to submit descriptions of their SCE programs which are sufficiently detailed to enable the SEA to certify that, if the programs are implemented as designed, they will meet all requirements for exclusion for comparability computations. On the basis of this analysis the SEA Title I staff should be required to expressly approve or disapprove the request for exemption.

In addition, OE should clarify that the application assurances LEAs must sign covering maintenance of comparability comstitute an assurance, as well, that they will comply with comparability exemption requirements.

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[94] 45 C.F.R§116.26(k)(1974); §116a.26(a), 41 FR 42923 (September 28, 1976). See the Comparability chapter of the Project's *Analysis*, supra, n.11 for a fuller discussion of the enforcement of the comparability requirement.

Once Title I programs begin, SEA Title I staff must be specifically responsible for ensuring that all federal legal requirements are in fact being met by LEAs invoking the SCE comparability exemption. SEA Title I staff should be required to monitor LEAs to determine whether children served in exempt SCE programs are educationally deprived, whether program objectives exist, whether the program is evaluated, and whether supplementary services are provided. (Note -- the SEA Title I staff need only monitor SCE program compliance with the three OE conditions on which the exemption is based. Other aspects of the SCE program--teaching techniques, SCE needs assessment results, etc.--need not be monitored by Title I staff.)

We also recommend that OE take two specific steps to assist SEAs in determining whether SCE comparability exemptions are properly invoked. First, OE should establish a procedure by which SEAs may seek federal certification that an SCE program, as legislated, has the four characteristics necessary to qualify for the comparability exemption.[95] In any case in which OE refuses to certify a program as similar to Title I,

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[95] Of course, the SEA must also determine that the funds in an SCE program which qualify as legislated are used in a manner that satisfies the conditions of Title I.

OE should explain in writing the specific reasons why the SCE program fails to meet one or more of the four requirements.[96]

Second, OE should prepare a policy manual[97] offering interpretations of the four requirements. These interpretations should include examples of commonly occurring problems which SEAs are likely to face in determining LEA qualification for comparability exemptions.

VI. Exemption of Other Types of State and Local Programs from Comparability Computations

The discussion thus far has concerned the exclusion of similar state or local special programs for educationally deprived children" from Title I comparability computations and has concerned particularly the OE requirements that must be met in order for an SCE program to qualify as similar to Title I.

The excess costs definition in the 1974 Amendments, supra, n.80 , also grants comparability exemptions to other specific state programs, namely

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[96] This certification, of course, would not relieve SEAs of the responsibility to ensure that SCE programs, as implemented, comply with the exemption requirements.

[97] This recommendation is more fully developed in the Lawyers' Committee *Analysis*, *supra*, n.11.

> bilingual programs or special education
> for handicapped children or children
> with specific learning disabilities.

Of particular significance is the exclusion of all bilingual programs, since not all the participants in such programs are educationally deprived children under the Title I definition. Also of significance is the fact that bilingual programs are limited to a finite group of children with a clearly defined, particular need;[98] thus, excluding bilingual programs from Title I comparability computations does not create a potential loophole through which disguised general aid funds could be allocated in a discriminatory manner and yet escape detection by the comparability ratios.

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[98] Another significant aspect of the portion of the excess costs definition which excludes bilingual and special education programs from comparability requirements is the added requirement that

> such expenditures for bilingual education and special education are used to provide, to children of limited English-speaking ability and handicapped children, and children with specific learning difficulties who reside in Title I project areas, services which are comparable to those provided to similarly disadvantaged children residing in non-project areas. [Emphasis added.]

This is yet a third use of the word "comparable." OE has interpreted this clause to require the submission of a "mini-comparability report" with respect to bilingual and special education programs.

Some of the states we surveyed have other types of programs which are difficult to implement without exemption from comparability. In fact, all state or local programs having the following two characteristics are susceptible to this problem: (1) the program serves only a limited number of students (either (a) because the program serves needs which only a limited number of children have or (b) because insufficient funds are available and the program does not serve all those who are eligible, or (c) because the program is being deliberately phased into full operation, a few schools at a time); and (2) the distribution of the population participating in the state program does not coincide with the distribution of the population participating in Title I programs.

Bilingual programs have both of these characteristics and that is precisely the reason why such programs need an exemption from comparability computations. The question naturally raised is whether all state and local programs having the two characteristics just mentioned should be eligible for exclusion from Title I comparability computations.

In answering this question it is appropriate to consider separately programs that are "limited eligibility" due, at least in part, to educational need criteria and programs that are "limited eligibility" due solely to funding restrictions. A bilingual program is an example of the first type. An underfunded program employing a new educational strategy from which all children might benefit is an example of the second type of program. (As discussed infra , California's ECE program is of this second type.)

Starting, then, with the first type of program, we observe that if merely any educational criterion defining a limited group of children with a "special" need were deemed to justify a comparability exemption, educational criteria which discriminate against educationally deprived children could be employed -- the result would be discrimination not only against educationally deprived children, but also against schools and school districts having large numbers of such children.

It would be possible to prevent this problem by disallowing any educational need criterion which produces a pool of eligible participants having a smaller percentage of educationally deprived children than the district as a whole. This approach would prevent the most significant potential abuses, but would not be entirely adequate. Some programs might be as worthy of exemption as bilingual programs and yet not be needed by numbers of educationally deprived children sufficient to meet the percentage requirement.

For example, special programs for gifted students could not meet a percentage requirement since, by definition, these programs serve a pool of eligible participants which includes no educationally deprived children. Some programs for gifted children might be deemed as worthy of exemption as bilingual programs, but if the exemption for the former were to be as broad as that for the latter, serious abuses could result. If "gifted" were to be defined as "above average" every non-educationally deprived child could participate, the result being a comparability exemption for funds nearly identical to general aid. Such an exemption would undermine the entire comparability requirement. Thus, while a percentage requirement would prevent all programs for gifted students from qualifying for a comparability exemption, the absence of such a requirement would allow serious abuses, unless other limiting criteria were formulated.

A percentage requirement by itself, moreover, would not be adequate to prevent several smaller abuses which, taken together, could constitute a significant problem. Every exemption is a legal excuse for not providing some Title I schools state and local funds and services equal to the non-Title I average without the exemption. The value of each exemption must be weighed against its effect -- the likely disadvantaging of some Title I schools. For example, if an LEA were to launch a proliferation of special programs each catering to the interests of children from one of thirty European ethnic backgrounds, one might conclude that the value of the programs is outweighed by the simultaneous disadvantagement of some Title I schools.

Because of the difficulties involved in ensuring that any general broadening of the comparability exemption does not create an undesirable "loophole," we do not recommend that a program be exempt from inclusion in Title I comparability computations just because, like a bilingual program, it serves a special educational need that not all children in the school district have. Rather, we recommend that Congress expand the exemption to accommodate additional special programs only after careful consideration of the particular need for each new exemption.

Such consideration should include analysis of the number of children in each state and the nation that would benefit from the expanded exemption, the availability of other federal funds to meet the needs intended to be met by the exemption (the existence of federal funds would lessen the need for new comparability-exempt state or local programs), the likely total cost of the exempt programs, the effect of the exemption on Title I schools and other relevant factors indicating the extent of the need for the expansion. The consideration of each proposed expansion of the current exemption should not be limited to a theoretical analysis of whether the new type of program under consideration merely shares with bilingual education programs the characteristics which necessitate the exemption of the latter.

Congress should expand the exemption only after convincing demonstration of the need for a particular new exemption is made. Such a demonstration should show that an important need of a portion of the school age population is currently being neglected because special state programs to meet that need would run afoul of Title I comparability requirements. Congress should also require demonstration that means of meeting that important need other than granting a new comparability exemption would be unsatisfactory.

With respect to programs that are "limited eligibility" due solely to funding limitations and not to educational need criteria, even greater scrutiny should be applied in considering accommodation by expansion of the comparability exemption. The reason is that such programs share an important characteristic with general aid funds -- all children can benefit from them. Before granting a new exemption for any underfunded program of this kind, Congress should require convincing demonstration of the reasons why they are not simply disguised, unequally distributed general aid. If the program is a "reform movement," Congress should ask why the reforms can only be accomplished by special new funds rather than simply changed use of regular funds. Congress should also inquire whether evidence indicates that the reforms are as beneficial to educationally deprived children as other children and whether the reforms tend to exacerbate the achievement differences between them. After considering these and other questions, such as the length of time the program will be underfunded and the percentage of the educationally deprived children eligible for the program that will actually participate during the period of underfunding, Congress should only legislate new exemptions that are tailored to closely fit the demonstrated need. This would ensure that an unintended loophole is not created.

The following paragraphs discuss the largest existing state program, among the 10 states we studied, that might be a candidate for an expanded comparability exemption of the kind just discussed, California's Early Childhood Education (ECE) program. Since some of the questions relevant to determining whether ECE programs should be exempt from Title I comparability computations are beyond our expertise we offer no recommendation as to whether ECE programs should, in fact, be exempt. We do, however, discuss principles which could be employed to tailor an exemption accommodating the ECE philosophy, should Congress eventually find this course desirable.

ECE programs[99] are intended to restructure the entire school environment in grades K-3 and provide, among other things, individualized instruction for all children. The ECE program is funded under a competitive grant system; individual schools within LEAs submit grant applications and program plans. The program is not fully funded and not all grant applications are approved. The program is being phased in; however, there is no present assurance that the level of full funding will be reached.

ECE funds, to the extent used in non-Title I areas, of course, raise the level of funds used for instructional services in those areas -- thus making Title I schools that do not receive ECE funds less likely to be comparable to the average non-Title I school. Providing ECE funds to all Title I schools would solve the problem, but this would require that Title I schools be given special consideration in the grant competition. Prohibition of competitive grant systems was not one of the original purposes of the comparability requirement. The requirement is simply intended to prevent discrimination against Title I schools.

The ECE program is not intentionally discriminatory in this sense.[100] Furthermore, if the program is phased into all schools rapidly, and if, while the program remains underfunded, a proportionate number of educationally deprived children are always served under it, any disadvantaging of Title I schools that might result from exempting ECE funds from comparability would probably not be severe, nor would it be long-lived.

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[99] The ECE program is described more fully, supra, at p.92.

[100] The ECE legislation includes a provision requiring that at least 50 percent of the schools within a district receiving ECE funding have high concentrations of educationally disadvantaged children. However, these need not be Title I , i.e., those with high concentrations of children from low-income families.

The portion of the ECE funds which are actually used for educationally deprived children, and which meet the four conditions described earlier in this Chapter, qualify for the current comparability exemption; but merely allowing exemption of a portion of the funds would not be an adequate solution to the comparability problems of the ECE program. ECE programs are designed to affect entire schools and unless educationally-deprived children are segregated in separate buildings from non-educationally deprived children (an unwelcome option), a potential comparability problem cannot be avoided under the language of the current exemption.

Should Congress wish to expand the existing comparability exemption to accommodate the ECE philosophy an exemption for programs with the following characteristics could be drafted:

(1) there must be a clearly identifiable program established pursuant to state law;

(2) the program must provide supplementary services, be based on performance objectives related to educational achievement and be evaluated;

(3) the program must implement the philosophy that either all children in a particular school should be equally served, or none should;

(4) the program will be phased into full operation in all schools within three years;

(5) during the phase-in period the percentage of the program participants who are educationally deprived will always be at least as high as the percentage of educationally deprived children in the district as a whole; and

(6) the LEA is separately accountable to the SEA for compliance with the requirements contained in the state law and implementing regulations and guidelines.

As stated earlier, on pp. 208-209, other questions should be addressed before a comparability exemption for programs like ECE is finally legislated. Exploration of these questions may reveal other characteristics which the programs should have in order to be exempt.

CHAPTER 8

THE TITLE I SUPPLANTING AND EQUITABLY PROVIDED PROVISIONS AND STATE COMPENSATORY EDUCATION PROGRAMS

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CHAPTER 8

THE TITLE I SUPPLANTING AND EQUITABLY PROVIDED PROVISIONS AND STATE COMPENSATORY EDUCATION PROGRAMS

I. Introduction

Title I funds must "supplement" and "in no case... supplant...funds from non-federal sources." 101/ Furthermore, services purchased with state and local funds must be "equitably provided to all children...without regard to the availability of Title I funds." 102/

The Title I legal framework prescribes which children will receive the additional resources provided by Title I: educationally deprived children residing in areas having high concentrations of children from low-income families. In other words, only certain children (educationally deprived children) residing in certain areas (areas having high concentrations of children from low-income families) are eligible for Title I assistance. The basis for this focus is explained in the Congressional Declaration of Policy in the Title I statute:

101/ Section 141(a)(3)(B) of the Title I statute (20 U.S.C. 241e(a)(3)(B)).

102/ Section 116a.22(b)(10), 41 FR 42919 (September 28, 1976).

> *In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs*, the Congress hereby declares it to be the policy of the United States to provide financial assistance to local educational agencies *serving areas with concentrations of children from low-income families* to *expand and improve* their educational programs by various means which contribute particularly to meeting the special educational needs of educationally deprived children.[103]

The basic purpose of the supplement, not supplant, and equitably provided provisions is to ensure that Title I funds are used to "*expand and improve*" existing programs so that they can serve the "*special*" unmet educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.

The supplement, not supplant and equitably provided requirements prohibit LEA discrimination against schools and children in the allocation of *state and local funds*, including SCE funds,[104] where the discrimination is attributable to the fact that those schools and children receive special assistance under Title I. Under the supplement, not supplant provisions, educationally deprived children residing in low-income areas must receive as much state and local funding as they would have received if Title I were not in existence. Similarly, the regulation specifying that SCE funds must be equitably provided to children eligible for Title I funds is an affirmative statement requiring that SCE services be fairly distributed according to objective criteria which do not consider the availability of Title I funds.

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[103] Section 101 of Title I (20 U.S.C. 241a).

[104] As explained in Part I, we use the abbreviation SCE to refer to either state or local compensatory education programs. Similarly, references to "state" programs in this chapter should be interpreted as referring to local programs as well.

In other words, under Title I, states and LEAs must use an objective method for distributing SCE funds which does not penalize educationally deprived children residing in low-income areas. Once the LEA chooses a particular method, it must distribute SCE funds in accordance with that method. While the supplement, not supplant and equitably provided provisions generally prohibit LEAs from taking into consideration the existence of Title I, this does not mean that SCE and Title I programs must serve the same educationally deprived children. Under an objective method for distributing SCE funds to educationally deprived children, a state or LEA can serve children that Title I does not or cannot serve, so long as the method of distribution is not merely a subterfuge for serving only children who reside in affluent areas which are ineligible for Title I programs.

This chapter explains the statutory and regulatory provisions establishing these principles, as well as OE's interpretation of these principles set forth in correspondence with SEAs. To illustrate the application of the principles to specific SCE programs, we have included a number of examples.

In general, we found that the present requirements pertaining to supplement, not supplant and equitably required are sound. However, as revealed in the examples in this chapter, a few problems exist which should be corrected through statutory changes. Most of these problems are technical. Only one is substantive: when SCE programs reach some very high levels of funding, there may be a disincentive for LEAs and states to expand further their SCE programs. Although the current Title I legal framework offers an incentive for LEAs to implement and expand SCE programs, this incentive disappears at high SCE expenditure levels as a result of the operation of the equitably provided clause. To counteract this disincentive, we recommend a statutory exemption from the "equitably provided" requirement in certain circumstances.

II. Overview of the Federal Legal Framework

A. Introduction

This section of the paper describes (a) the relevant sections of the Title I statute and regulations pertaining to the supplement, not supplant and equitably provided provisions and (b) OE's interpretations of these provisions contained in correspondence with SEAs.

B. Supplement, Not Supplant Provisions[105]

The basic purpose of the "supplement, not supplant"[106] provisions of the Title I statute is to ensure that Title I funds are used to provide and pay only for supplementary programs designed to meet the "special" educational needs of educationally deprived children residing in low-income areas. These provisions prohibit LEAs from discriminating against children participating in Title I programs in the provision of state and local funds because such children are receiving federal assistance.

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[105] For an in-depth analysis, see the Legal Standards Project's paper cited *supra*., n. 11 at Chapter 9.

[106] The "supplement, not supplant" provision was added to the Title I statute in 1970, even though the basic structure of Title I has always required that Title I funds must supplement and never supplant state and local funds. The Senate Committee Report No. 91-634 accompanying the amendments adding the supplanting provision explained, "under present law there is no specific prohibition against supplanting state and local funds with federal funds *even though* supplanting would be inconsistent with the theory of Title I. Title I funds are intended to be supplementary to the education program generally offered by the States and local educational agencies." 1970 *U.S. Code Cong. and Adm. News* 2781.

The existence of Title I funds may not be taken into consideration when the school district distributes regular and compensatory education funds from state and local services to educationally deprived children. When state and local funds are distributed, educationally deprived children residing in low-income areas may not be "penalized."

The supplement, not supplant regulations require that the use of Title I funds not result in a decrease in the level of state and local funds that "would be made available" to educationally deprived children but for the existence of Title I funds.

The supplement, not supplant requirement set forth in the Title I statute (Section 141(a)(3)(B)) provides:

> Federal funds made available under this Title will be so used (i) as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this Title, and (ii) in no case as to supplant such funds from non-Federal sources.

Section 116.40 of the regulations provides: [107]

> (a) General. (1) Each application by an applicant agency for a grant under Title I shall contain an *assurance* that the use of the grant funds will not result in a decrease in the use (for educationally deprived children) of State or local funds which, in the absence of funds under Title I, would be made available for the education of such children, and that *such children* will *not* otherwise be *penalized* in the application of State and local funds because of such a use of funds under Title I.

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[107] 41 FR 42906 (September 28, 1976). These new regulations are virtually identical to those in effect at the time of our interviews in the ten states (45 C.F.R. §116.17(h)(1975)).

> (2) No project under Title I shall be approved unless Federal funds made available for that project (i) will be used to supplement and to the extent practical, increase the level of State and local funds that would, in the absence of such Federal funds, be made available for the education of pupils participating in that project; (ii) will not be used to supplant State and local funds available for the education of such pupils;
>
> (b) Services which applicant is required to provide. Title I funds shall not be used to provide services which the applicant agency is required to provide by State law or pursuant to a formal determination under Title VI of the Civil Rights Act, Title IX of the Education Amendments of 1972 (Pub. L. 92-318), or section 504 of the Vocational Rehabilitation Act of 1973, as amended, or pursuant to a final order of a court. [Emphasis added.]

The language of the statute and section 116.40(a)(1) differ in one respect: the statute refers to "pupils participating in programs and projects assisted under this title" while the regulation refers to "educationally deprived children".[108]

In correspondence with SEAs, the Office of Education has clarified that the frame of reference for considering the application of the supplement, not supplant provision to SCE programs is *educationally deprived children, taken as a whole, who reside in low-income areas* (i.e., all children eligible for Title I programs). This frame of reference has been required to avoid over-rigidity in the interaction of SCE and Title I programs and other consequences that would be contrary to the intent of Congress to encourage the expansion of SCE programs. 109/

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[108] (The second paragraph of this section quotes the language of the statute.)

If Title I were fully funded, virtually all educationally deprived children in low-income areas would be Title I participants. However, because Title I is not fully funded, it can, in fact, provide programs of the sufficient size, scope and quality only to a portion of the total number of eligible children.

Congress, in recent amendments to Title I, intended to encourage states and LEAs to develop and expand SCE programs for educationally deprived children--including those in low-income areas who, while eligible for Title I,

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109/ Agencies are authorized to promulgate regulations which vary from a literal reading of the terms of the statute where: (a) the Congressional intent is clear; (b) the agency's interpretation is consistent with the "spirit", "purpose", and "underlying policy" of the statute; and (c) the agency's interpretation avoids unreasonable results. See *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), *Philbrook v. Glodgett*, 421 U.S. 707 (1975), *Morton v. Ruiz*, 415 U.S. 122 (   ) (dictum), *Perry v. Commerce Loan Company*, 384 U.S. 934 (1966), and *U.S. v. American Trucking Association*, 310 U.S. 534 (1940).

are not now served. If the frame of reference for considering supplanting issues were solely children who presently participate in Title I programs, it could be considered a violation of the supplanting provision to use SCE funds primarily to serve children eligible for Title I who receive no Title I services because Title I is not fully funded--this is so because such children are prevented from "participating" in Title I programs by insufficient federal funds. The Office of Education's interpretation which uses all children eligible for Title I services as the frame of reference for supplanting, carries out the intent of Congress by allowing SCE funds to be flexibly used in conjunction with Title I to expand the services provided to educationally deprived children in low-income areas who Title I can not now serve.

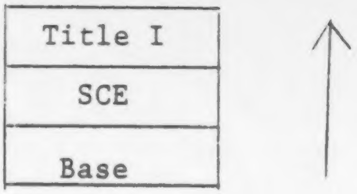
It is likely that Congress did not consider the consequences for the distribution of SCE funds of focusing solely on Title I participants for considering supplanting issues when Title I is not fully funded and many eligible children are prevented from participating in Title I. These consequences are that (a) SCE funds, which could have been used to provide compensatory education programs to children eligible for, but not served by, Title I must be used for children who already receive Title I services, and (b) flexibility in coordinating the use of SCE and Title I funds, thereby enabling the LEA to serve all Title I eligible children, is substantially inhibited.

In sum, Congress, in statutory amendments to Title I pertaining to SCE programs , intended to encourage states and LEAs to serve additional educationally deprived children with SCE programs. Using actual participants in Title I programs, rather than those children eligible to participate, as the reference for supplanting issues would have the opposite effect. To avoid the consequences described above, resulting from the underfunding of Title I, the Office of Education in regulations, and interpretations given to SEAs has consistently used all educationally deprived children in low-income areas (the children that would participate in Title I programs if Title I were fully funded) as the frame of reference for considering issues pertaining to the supplement, not supplant requirement. This interpretation, in our opinion, carries out the intent of Congress under circumstances where Title I is not fully funded. It ensures that children eligible for Title I, taken as a whole, are not discriminated against in the provision of SCE programs and creates needed flexibility in coordinating SCE and Title I programs for educationally deprived children residing in low-income areas.

The general principles of OE's interpretation of the supplement, not supplant requirement are outlined in the paragraphs below. Later in this chapter we illustrate, with examples, the application of these principles to specific factual situations and a statutory amendment which will put to rest questions concerning the legal basis for OE's interpretations.

The standards and operative definitions as interpreted by OE establish general principles for LEAs to apply in distributing state and local funds, including SCE funds. First, base state and local allocation must be distributed without considering which schools receive Title I funds. Then, SCE funds are distributed according to state regulation policies established by the LEA without considering the existence or distribution of Title I funds. Finally, Title I funds are distributed by the LEA according to the federal regulations. This three-step distribution process is frequently called "layering."

The following illustration shows this process graphically:



The general principle that SCE funds must be distributed without regard to the existence of Title I is subject to an important qualification: the existence of Title I funds can be taken into account in the allocation of SCE funds so long as educationally deprived children in poor areas, receive, in the aggregate, the same amount of SCE funds as they would have received if Title I were not in existence. In other words, so long as children eligible to receive assistance under Title I, taken as a whole, are not penalized in the provision of SCE funds, the supplement, not supplant requirement has been fulfilled.[110] This qualification to the general principle that SCE funds must be distributed without regard to the existence of Title I is contained in regulations and correspondence with SEAs. As is discussed in detail later in the chapter, the qualification adds great flexibility to the administration of SCE and Title I programs.

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[110] Another requirement, that SCE funds be distributed according to objective standards, must be referred to to determine the level of SCE funds that "would have been provided," but for the existence of Title I.

C. The Equitably Provided Provision[111]

Services provided with state and local funds must be "equitably provided to all children...without regard to the availability of Title I funds." This is referred to as the "equitably provided requirement," which appears in the revised regulations. Specifically, the revised regulations state that the SEA may not approve a Title I application unless it has determined that

> services are equitably provided to all children with state and local funds without regard to the availability of Title I funds in the applicant's schools for the educationally deprived children.[112]

This provision implements the statutory requirements that Title I funds be used to meet the special educational needs of educationally deprived children and that Title I funds are supplemental by requiring that educationally deprived children in low-income areas receive an equitable share of services provided with state and local funds.

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[111] For an in-depth analysis of this provision, see the paper cited *supra*, n. 11 at Chapter 11.

[112] §116a.22(b)(10), 41 FR 42919 (September 28, 1976).

The preamble to the revised regulations explains that the "equitably provided" clause replaces, in part, the "ordinarily provided clause[113] and applies directly to SCE programs:

> Comment. Several comments expressed concern about, or requested clarification of the term "ordinarily provided" as it was used in subparagraph (a)(2), particularly as it applies to State and locally funded compensatory programs.
> Response. The clause containing this term was deleted. Since other provisions of the regulations clearly indicate that services generally provided for all children are not to be paid for from Title I funds there is no need for this clause. A similar provision has been inserted in §116a.22(b)(10), and modified to address the issues of the use of Title I funds by local educational agencies when State and local funds are being used for purposes that are similar

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[113] The "ordinarily provided" requirement stated: "No project under Title I of the Act will be deemed to have been designed to meet the special educational needs of educationally deprived children unless the federal funds made available for that project (3) will not be used to provide instructional or auxiliary services in project area schools that are ordinarily provided with state and local funds to children in non-project area schools." 45 C.F.R. §116.17(h)(3)(1974).

to those of Title I. 114/

Letters written by OE in the last few years indicate that the equitably provided standard was applied by OE even prior to the issuance of the revised regulations. These letters further clarify the development and meaning of this standard. In a letter to one state, OE used the concept of equitably provided to explain that Title I areas may not be subject to discrimination in the distribution of SCE funds.

> If ...a local educational agency using State funds were to provide specific compensatory education services exclusively for children in areas not designated for projects, that agency would be violating the provisions of Section 141(a)(3)(B) of Title I and the regulation in 45 C.F.R. §116.17(h) prohibiting the supplanting of State and local funds. ...
>
> The local educational agency would not be complying with the foregoing if it attempted to provide compensatory education services in the Title I areas with Title I funds and to provide similar services in the non-Title I areas with State or local funds. Any State compensatory education program, therefore, should be established so as to make it available on an equitable basis to Title I and non-Title I areas. [Emphasis added.]

More recently, OE stated this policy with greater refinement:

114/ 41 FR 42896 (September 28, 1976). The preamble repeats this point at 42903:

> As indicated in the comments on §116.40, the provision concerning services 'ordinarily provided' with state and local funds is now found in §116a.22 (b)(10), and has been modified to address the use of Title I funds when state and local funds provide services that are similar to those provided under Title I.

> First of all, the local educational agency for the newly organized school district should determine how and to what degree various educational services should be provided in the schools of the district. Any such service which cannot be provided for all children must, however, be equitably distributed in Title I and and non-Title I areas before the local educational agency may consider replicating that service with Title I funds (if it meets Title I criteria) or supplementing that service with Title I funded services. The distribution of such a service to children in Title I and non-Title I areas must be in proportion to the number of children in those areas who qualify for that service according to objective criteria.
>
> Under the foregoing conditions the local educational agency could use Title I funds to provide similar services in Title I areas that cannot be reached by the State and locally funded program or to supplement such programs in ways that meet Title I criteria. In the event that more State-local funds become available for such service the principle of proportionality in the distributions of such services among children in Title I and non-Title I areas would have to be maintained.
>
> As you may know, the House Report on the Education Amendments of 1974 indicated a desire on the part of Congress to encourage the use of State and local funds for compensatory education programs. The Office of Education also wishes to encourage the use of State and local funds for this purpose but with the understanding that children in need of such services in Title I areas must have an equal opportunity to receive such services with equally needy children in non-Title I areas. A disproportionate distribution in non-Title I areas of State and locally funded compensatory education programs would preclude the use of Title I funds for similar programs. [Emphasis added.] 115/

115/ Under the revised regulations, equitable provision

In sum, these letters explain that the distribution of SCE services must be *in proportion* to the number of educationally deprived children residing in Title I and non-Title I school attendance areas[116] who qualify for the services according to *objective criteria*, e.g. all children below the 25th percentile in reading.

The sections which follow discuss in greater detail the two components of the equitably provided provision--

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(footnote continued from previous page)

of SCE services to Title I areas is a requirement LEAs must meet in order to be eligible *at all* for Title I funds. The original "ordinarily provided" clause was a restriction on how Title I funds could be spent, rather than a threshold eligibility requirement. This is reflected in the last sentence of the quoted letter, which was written prior to the promulgation of the revised regulations.

[116] The letters do not, however, expressly clarify whether the phrases "Title I areas" and "children in Title I areas" mean *eligible* areas and children or areas and children *actually receiving* Title I funds. Nonetheless, OE has consistently interpreted the equitable provision concept as applying to eligible areas and children, taken as a whole.

the objective criteria requirement and the proportional distribution requirement.

1. The Objective Criteria Requirement

The objective criteria requirement ensures that SCE funds will be distributed without discrimination against Title I project areas or children participating in Title I programs. The requirement guards against two types of discrimination.

First, the objective criteria requirement operates to prevent either conscious or unconscious penalization of Title I project areas or program participants. It accomplishes this by disallowing subjective methods for determining which areas and which children may receive the benefits of SCE programs. For example, if SCE legislation specified that "any educationally disadvantaged child in the district may participate in the SCE program at the discretion of the LEA," it would be impossible to determine whether areas or children will be chosen to participate in a SCE program "without regard to the existence of Title I." If the subjective recommendations of LEA staff members were deciding factors in which children will participate in an SCE program, such decisions could, consciously or unconsciously, be based on which children do not receive assistance under Title I. The effect of such subjective criteria would be to penalize children participating in

Title I programs in the provision of SCE funds simply because of the existence of Title I funds.

Secondly, the objective criteria requirement ensures that the distribution system will not penalize children eligible for Title I by requiring that the SCE standard be non-discriminatory on its face.[117/] For example, the following standard would not satisfy the "objective criteria" requirement: "SCE funds must be distributed to educationally deprived children performing below the 25th percentile residing in non-Title I areas."

Although the standard is clear and is not "subjective," i.e., "Quartile I children residing in non-Title I areas," it discriminates, on its face, against Quartile I children residing in Title I project areas.

It would be appropriate for an LEA to distribute SCE funds according to the number of children performing at or below the 25th percentile. Similarly, it would be appropriate if the standard were "below the 50th percentile." Both standards are objective criteria of educational need.[118/]

117/ This interpretation of the objective criteria requirement flows directly from the supplement, not supplant provision which prohibits discrimination against Title I children in the allocation of services provided with state and local funds, and from the "equitably provided" regulation.

118/ The objective criterion must be to the need, or degree of need, for the service to be equitably provided. The need for SCE services determines the proportional distribution of SCE funds in Title I and non-Title I areas (the

In sum, the objective criteria requirement ensures that educationally deprived children residing in low-income areas are not penalized or prejudiced in the provision of SCE funds because of arbitrary decisions made by LEA staff or because of the existence of an arbitrary standard.

(footnote continued from previous page)

"proportional distribution" requirement is discussed in the next section of the text).

The objective criterion must not finesse the proportional distribution requirement by itself incorporating a pre-determined criterion of ultimate distribution which bears little or no relation to the needs of the children to be served. For example, the objective criterion,"one special reading teacher per school," would--in all but the rarest circumstances, involving sheer coincidence--be unacceptable. The schools might be of different size and might have different numbers of children needing the services of a special reading teacher; the children in different schools might need such services, moreover, to different degrees. Under such circumstances, use of the criterion, "one special reading teacher per school" would not be equitable because it attempts to avoid the proportional distribution requirement by building in a distribution requirement of its own, one that is likely to be irrelevant to the different degrees of need for the service in different schools. Of course, if, through sheer coincidence, the criterion "one special reading teacher per school" were to actually reflect the distribution of the need for special reading teacher services, then it would be an acceptable ultimate criterion of distribution. Its acceptability in this regard, however, presupposes equality of need from school to school under an objective standard of need. Thus, the analysis comes full circle; an objective standard of need first must be established before the validity of any ultimate criterion of distribution can be determined.

In sum, the objective standard employed to meet the objective criteria requirement must be a standard reflecting need for the service to be provided. It must not be a standard which makes presuppositions that do not, in fact, reflect reality.

Objective, non-discriminatory distribution criteria for SCE funds are essential. We recommend that LEAs be required in their Title I applications to set forth in detail the objective criteria used to distribute SCE funds.

2. The Proportional Distribution Requirement

In many cases SCE funds will not be sufficient to provide services to all children eligible under the objective criteria selected. In this situation, where some but not all potential beneficiaries will receive services, SCE funds must be proportionally distributed.[119]

For example, assume that (a) an SCE program incorporates the objective criterion that SCE funds will be distributed in equal amounts per eligible child to meet the needs of educationally deprived children in grades K-6 performing below the 25th percentile; (b) 80 percent of the children performing below the 25th percentile reside in Title I eligible areas; (c) the SCE program is underfunded so that

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This analysis of the objective criteria requirement, it should be noted, applies only to funds not governed by the Title I comparability requirement i.e., SCE funds which an LEA seeks to have excluded from comparability. The Title I comparability requirement employs a standard which reflects the distribution of more than one service. In a given school, underfunding of one service can be counterbalanced by greater funding of another, with the result being full satisfaction of the comparability requirement. The equitably provided requirement was not intended to change this result for services and funds governed by the comparability requirement.

[119] Allocation of more than a proportionate share of Title I eligible areas is acceptable. See *infra*, at p. 272.

not all those eligible under the objective criterion can be served; and (d) the State does not require LEAs to distribute limited SCE funds to schools in rank order, according to the incidence of educational deprivation.[120]

Because 80 percent of the eligible children reside in Title I eligible areas, the LEA, under the proportionality requirement must distribute, at a minimum, 80 percent of its SCE appropriations in Title I eligible areas. The distribution within Title I areas must be made without discriminating against children who would have received assistance under the SCE program but for the existence of Title I.

3. Summary of the Objective Criteria and Proportionality Requirements

If these principles are followed, Title I schools which do not receive assistance under the SCE programs may use Title I funds to provide the same type and level of services provided with SCE funds. Furthermore, Title I funds may be used in school's receiving both Title I and SCE funds to provide the same type and level of services provided with SCE funds in non-Title I areas.

III. Acceptable and Unacceptable Methods For Funding Compensatory Education Programs From Federal and State Programs

A. Introduction

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[120] The significance of this factor is discussed *infra* at p. 243.

As explained supra, the primary purpose of the supplement, not supplant and equitably provided requirements in regard to SCE programs is to ensure that the basic focus of Title I, i.e., meeting the special educational needs of educationally deprived children residing in low-income areas is not distorted by the LEA. An LEA cannot substitute its own policy for the Title I policy focusing on low-income areas.

The supplement, not supplant and equitably provided requirements prevent such a substitution from taking place. However, as the examples that follow illustrate, LEAs and states retain great flexibility to promote their own compensatory education policies with SCE funds. Of course, these Title I requirements do, for example, preclude one possible state policy: use of SCE funds to serve only educationally deprived children in its more affluent attendance areas - a policy which would discriminate against Title I children.

Several alternatives for satisfying the supplement, not supplant and equitably provided provisions are analyzed in the following pages. Approaches which, in our opinion, would not satisfy the current OE requirements are also described. In addition, alternatives which satisfy current OE policy but which may be construed as being inconsistent with one possible reading of the statute and regulations are discussed as well. Following this discussion, we offer recommendations for clarifying and modifying the existing federal legal framework. The proposed changes are less restrictive than the current provisions, but preserve the essentials of the policy prohibiting penalization of Title I eligible areas or children in the distribution of SCE funds.

B. A State Program Which Targets Schools According to the Degree of Educational Deprivation Rather Than Economic Criteria

1. Introduction and Basic Assumptions

Under Title I, LEAs are required to rank schools according to economic criteria. The schools having the highest incidence of poverty must generally receive Title I funds before schools with a lower incidence of poverty receive assistance.

In this example the state has chosen to target school attendance areas according to the objective criterion of educational rather than economic disadvantage for distribution of SCE funds. In other words, under state law or local policy SCE funds must be used in schools having the highest incidence of educational deprivation before lower ranked schools receive assistance. We will see how the supplement, not supplant provision operates in this situation. In the examples below both LEAs No. 1 and No. 2 apply the same educational criterion for distribution of SCE funds. However, LEA No. 2, because it uses Title I funds to replace SCE funds that would have been available to Title I eligible children, has violated the supplement, not supplanting requirement. LEA No. 1 has not.

For purposes of these two examples, make the following assumptions.

(1) The objective criterion governing the distribution of SCE funds provides that children in the first quartile (Q_1) in reading achievement in grades K-6 may participate. All other educationally deprived children are ineligible for assistance, i.e., second quartile (Q_2) children in K-6 and Q_1, and Q_2 children in grades 7-12.

(2) Elementary schools are ranked according to the number of children in the first quartile. SCE funds must be distributed to the highest ranked schools before funds may be used in lower ranked schools.

(3) The state legal framework requires LEAs expend a minimum of $300.00 in SCE or Title I on each child in a compensatory education program.

(4) There are 500 Q_1 students in grades K-6 eligible for assistance under the SCE program; in addition, there are 500 Q_2 children in K-6 and 1000 Q_1 and Q_2 children in grades 7-12.

(5) SCE funds in the amount of $75,000 are available to the LEA. (It would take $150,000 to provide SCE services to all 500 Q_1 students in grades K-6 in each of the districts described below ($300 x 500 Q_1 students)).

(6) $150,000 are available from Title I (amount appropriated by Congress).

We will now consider the funds distribution plans of LEAs No. 1 and No. 2.

2. Acceptable Fund Distribution Scheme- LEA No. 1

LEA No. 1 has enough money to serve 250 students with SCE funds (75,000 ÷ \$300 = 250).

LEA No. 1 has six elementary schools. The ranking of the schools according to the number of educationally deprived children scoring in the first quartile is set forth below. As indicated in parentheses three of the schools are also eligible for assistance under Title I.

	Number of Q_1 Students
School A (Title I eligible)	130
School B (Title I eligible)	120
School C (Title I eligible)	80
School D (Ineligible)	75
School E (Ineligible)	50
School F (Ineligible)	45

In accordance with the school ranking used for distribution of SCE funds, these funds would "run-out" after serving school B. Thus, LEA No. 1 uses SCE funds for Q_1 children in schools A and B[121] and Title I funds are then used to meet the needs of (a) Q_1 children in school C, (b) Q_2 children in elementary schools eligible under Title I for assistance (A, B, and C), or (c) Q_1 and Q_2 children in grades 7-12 residing in eligible areas.

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[121] The circumstances under which an LEA may provide a compensatory education program funded solely from SCE instead of Title I funds at a school which would have received funding under Title I but for the existence of the SCE program are described *infra*, in Chapter 9.

Under the supplement, not supplant restriction Title I funds may not be used to replace (supplant) the level of state and local funds that would have been provided but for the existence of Title I. The level of state and local funds that "would have been provided" in this example is determined by reference to the objective method of fund distribution selected, i.e., for the distribution of SCE funds, schools having the highest incidence of educational deprivation receive assistance before lower ranked schools. In other words, under the supplement, not supplant provision, SCE funds must be distributed in accordance with the objective criterion established by state law or local policy as if Title I funds were not available; then, Title I funds are allocated in accordance with federal rules to meet the needs of educationally deprived children in low-income areas. In LEA No. 1, this means that 100 percent of the SCE funds are used to meet the needs of educationally deprived children in low-income areas (Title I areas) because the money runs out after schools A and B are served and both are Title I schools. If the two highest ranked schools were ineligible for assistance under Title I they would receive 100 percent of the SCE funds pursuant to state law. Title I areas would have received no assistance. In both cases, the LEA would fully comply with Title I.

3. Unacceptable Fund Distribution Scheme-LEA No. 2

Assume that LEA No. 2's ranking of schools by educational deprivation is identical to LEA No. 1's ranking. However, it is the policy of LEA No. 2 that any high ranked school (based on SCE criteria) which is also eligible for assistance under Title I receive funding under Title I instead of under the SCE program. In other words, schools which would otherwide have received assistance under the SCE program but for the existence of Title I are skipped and, instead receive assistance under Title I. LEA No. 2 prefers to use Title I instead of SCE funds in high ranked schools to further its objective of serving all children in the district eligible for the SCE program, i.e., Q_1 children in grades K-6, irrespective of their residency. The LEA's policy is contrary to the objective criterion established by the state for distribution of SCE funds.

Thus, based on the LEA's ranking, School A would have received $39,000 in SCE funds (130 x $300 = $39,000) but for the existence of Title I. However, because school A is eligible for Title I, LEA No. 2 does not distribute any SCE funds to it. Similarly, LEA No. 2 uses $36,000 (120 x $300.00 = $36,000) in Title I funds rather than SCE to meet the needs of Q_1 children in school B, which, but for the existence of Title I, would have received assistance under the SCE program.

LEA No. 2 has supplanted SCE funds with Title I funds. Educationally deprived children in low-income areas have been discriminated against with respect to the distribution of $75,000.00 in SCE funds. But for the existence of Title I, Q_1 children in schools A and B would have received SCE funds under the objective criterion for their distribution, as in the case of LEA No. 1.

A recent decision by a United States District Court, faced with virtually identical facts described in the LEA No. 2 hypothetical, sustained this conclusion.[122]

4. Conclusions

In sum, where the SCE legal framework requires districts to serve schools in rank order, based on the incidence of educational deprivation (or other objective criterion), it is clear that an LEA may not skip a school eligible for assistance under a SCE program simply because the school is also eligible for assistance under Title I. The effect of such a policy would be to defeat the objective of Title I, which is to meet the needs of educationally deprived children residing in low-income areas. The objective of Title I is defeated by the discrimination against low-income areas in the distribution of SCE funds. In LEA No. 2 the replacement of SCE funds with Title I funds results in both Title I and SCE funds being used to underwrite a state policy focusing compensatory education funds on educationally deprived children, irrespective of their residency.

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[122] Alexander v. Califano, No. C-76-1982, (N.D.Cal. May 23, 1977).

It is important to point out that a state is not forbidden from using SCE funds for educationally deprived children residing in areas ineligible for Title I. Indeed, the present supplement, not supplant and equitably provided concepts were developed to encourage states to expand compensatory education opportunities. All they require is that low-income areas not be discriminated against in the distribution of SCE funds.

It is also important to understand that Title I, does not require that LEAs rank schools according to their incidence of educational deprivation. Title I simply requires that an LEA continue the same distribution of SCE funds which it would use if it had no Title I funds to allocate. If, in the absence of Title I funds, the SCE funds must be spent in schools in order of the educational need rank order, the SCE monies must continue to be expended in that same pattern even though some high-ranked schools may also be eligible to receive Title I funds.

Title I does not require that states adopt a ranking system. There are other funding methods which satisfy the supplement, not supplant and equitably provided regulations. For example, instead of requiring that LEAs rank schools according to the incidence of educational deprivation, an SCE program could adopt any of the policies described below. First, the LEA could set an objective cut-off point at, for example, Q_1 and Q_2 and, to the extent there are insufficient SCE funds to meet the needs of all eligible children, provide a proportional share at each school in the district, depending on the number of eligible children in attendance.[123/] Second, Title I funds could be used to meet the needs of children in certain grades, e.g., 7-12, whereas the SCE funds could be used in other grades, e.g., K-6. Under both of these alternatives, the objective criterion must be applied in an identical fashion in Title I as well as non-Title I areas, e.g., SCE funds serve only K-6

[123/] The various options for jointly funding a compensatory education program with Title I and SCE funds are described and analyzed in Chapter 10.

children in both areas. Such SCE fund distribution schemes, which do not require the ranking of schools, are analyzed below.

C. An SCE Program Restricting the Total Number of Project Participants-LEA No. 3

In contrast to the fund distribution scheme described in the previous example, the funding scheme in this hypothetical does not include a school attendance area ranking provision. Thus, assume in the hypothetical below that:

(1) There is no school attendance area ranking requirement.

(2) The objective criterion governing the distribution of SCE funds provides that children in the first quartile (Q_1) in reading achievement in grades K-6 may participate (a restriction on the number of project participants).

(3) The state legal framework requires that the total number of children participating in the SCE program not exceed the total allocation divided by $300 (another restriction on the number of project participants).

(4) SCE funds in the amount of $75,000 are available to the LEA. (It would take $150,000 to provide SCE services to all 500 Q_1 students in grades K-6).

(5) There are 200 eligible children in each of two Title I schools and 50 eligible students in each of two non-Title I schools (total 500).

(6) $150,000 are available from Title I.

Title I Schools		Non-Title I Schools	
200	200	50	50

The LEA, recognizing that it will not be able to fund services for all eligible students decides to distribute state funds in the following manner:

First, it determines the total number of eligible students who may participate, by dividing $75,000 (amount of SCE available) by $300.00 (see assumption 3 above) = 250 students.

Since only 50 percent of the eligible students may actually receive services under the SCE program, the LEA must decide which children to select. The LEA makes the following calculations:

Eighty percent of the eligible children (400 of the 500) reside in Title I attendance areas; therefore 80 percent of the SCE education funds, $60,000 must be used in these areas ($75,000 x 80 percent = $60,000). The remaining $15,000 may be spent in non-Title I areas.

By dividing the total number of funds available for Title I schools by $300, the LEA determines that it can provide services to 200 children in eligible areas ($60,000 ÷ $300 = 200)[124] and 50 children in non-Title I areas ($15,000 ÷ $300 = 50).

Applying the above procedure, the LEA provides SCE funded services to half of the eligible children attending Title I schools and half of the eligible children attending non-Title I schools. Title I funds are then used to provide services to three other groups of children -- the remaining 200 Q_1 children in Title I areas, Q_2 elementary school children in Title I areas, and Q_1 and Q_2 children in grades other than K-6.

The LEA's distribution of SCE funds fully complies with the present requirements. State funds are distributed equitably, without penalization of Title I areas or program participants.

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[124] The question remains whether and under what circumstances an LEA must also provide Title I funds to the 200 Q_1 children residing in Title I areas receiving assistance under the SCE program. This issue is analyzed *infra*, in Chapter 9.

D. An SCE Program Which Includes A Single Concentration Requirement Applicable to Title I As Well As The SCE Program-LEAs No. 4, 5 and 6

1. Introduction and Basic Assumptions

The fund distribution scheme developed by the state in this hypothetical also does not include a school attendance area ranking requirement: In this regard it is similar to the previous example. In the previous example of LEA No. 3 we were not concerned with the concentration requirement applicable to Title I funds. In the example below, however, we assume that the same concentration requirement is applicable to both Title I and the SCE program. Thus, in this example make the following assumptions:

(1) There is no school attendance area ranking requirement.

(2) The objective criterion governing the distribution of Title I and SCE funds provides that children in the first quartile (Q_1) in reading achievement in grades K-6 may participate. Educationally deprived children in grades K-6 in the second Quartile (Q_2) and Q_1 and Q_2 children in grades 7-12 are ineligible.

(3) There are 200 Q_1 children in each of two Title I elementary schools and 50 eligible students in each of two non-Title I elementary schools (total 500).

(4) There are 500 additional educationally deprived children in K-6 who are in the second quartile (Q_2) and 500 educationally deprived children in grades 7-12 who are not receiving any assistance under the Title I or SCE program.

(5) The state legal framework requires LEAs to expend a minimum of $300.00 in compensatory education funds on each child in a compensatory education program. Under the state guidelines, either SCE or Title I funds, or both, may be used to meet this $300.00 expenditure per pupil.

(6) SCE funds in the amount of $75,000 are available to the LEA. (It would take $150,000 to provide SCE services to all 500 Q_1 students in grades K-6).

(7) $150,000 are available from Title I (amount appropriated by Congress).

Elementary Schools

Title I Schools		Non-Title I Schools	
200	200	50	50

We will consider alternative fund distribution plans of three different LEAs.

2. Acceptable Fund Distribution Plans

a. Separate Funding in Title I Areas of Title I and SCE programs--LEA No. 4--LEA No. 4 recognizes that $60,000 of the $75,000 allocation must be expended in Title I schools since 400 of the 500 or 80 percent of the eligible students reside in Title I areas. The LEA satisfies the $300.00 concentration requirement by providing only SCE funds to one Title I eligible school (200 children x $300 = $60,000) and uses only Title I funds in the other Title I school. The remaining $15,000 of SCE funds are used to provide services to the 50 Q_1 in one of the non-Title I schools ($15,000 ÷ $300 = 50). This LEA then uses the remainder of its Title I allocation to (a) provide additional services to the O_1 children attending the elementary schools, (b) serve O_2 elementary school children or (c) eligible children attending high schools in Title I areas.

b. Joint Funding of a Compensatory Education Program in Title I areas using Title I and SCE funds--LEA No. 5--LEA No. 5 decides to distribute SCE funds in the following manner. First, like LEA No. 4, it also determines that since 400 of the 500 eligible students reside in Title I areas, 80 percent of the funds ($60,000) will be provided to children in Title I areas. However, recognizing that there are 400 eligible children in the Title I areas, LEA No. 5 distributes $150 ($60,000 ÷ 400) per child from SCE and $150 per child for each child from Title I.[125] The total for each child is $300. Thus, the concentration requirement has been satisfied. In the non-Title I areas, the LEA satisfies the $300 concentration requirement by serving 50 of the 100 eligible students with the remaining SCE funds. The remainder of the Title I allocation is used in Title I attendance areas to provide additional services to O_1 elementary school children or to fund services for O_2 elementary school children and eligible children attending high schools.

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[125] Of course, since Title I funds are used for the program, all Title I requirements concerning program design, etc. would have to be met. See chapter 10 on the coordination of Title I and SCE programs.

c. Conclusions and Recommendations--To what extent are the practices of these two LEAs consistent with the supplement, not supplant and equitably provided provisions?

We conclude that the practices pursued by LEA No. 4 and LEA No. 5 are both consistent with the existing regulations and informal legal framework developed by OE and that the OE policy is consistent with the supplement, not supplant provision set forth in the statute. However, because we have also concluded that a court might interpret the statute differently from OE, we recommend that the statute be clarified. These conclusions are explained below.

As explained *supra*, the supplement, not supplant provision set forth in the statute provides that LEAs must supplement, not supplant the level of funds that would, in the absence of Title I, be made available to educationally deprived children residing in low-income areas participating in Title I programs. Similarly, the equitably provided provision requires that SCE services be distributed without regard to the availability of Title I funds.

One interpretation of the underlined phrases in the previous sentences is that under no circumstances may a LEA take into consideration the existence of Title I in distributing SCE funds. The procedure used by LEA No. 4 is clearly consistent with this interpretation since SCE funds are distributed without regard to the availability of Title I. In LEA No. 4 children receive $300.00 in SCE funds regardless of whether they reside in a Title I eligible area or an area ineligible for Title I.

The procedure used by LEA No. 5 is also consistent with the purpose of the federal policy, although the distribution scheme does take into consideration the existence of Title I. As compared to LEA No. 4, educationally deprived children in LEA No. 5 attending one Title I eligible school receive $150 more SCE funds than they would have received in the absence of Title I, and educationally deprived children attending the other Title I eligible school receive $150 less SCE funds. But this is counter-balanced by the first Title I eligible school receiving $150 less in Title I funds and the other Title I eligible school receiving $150 more Title I funds than they would have received if LEA No. 5 had not taken into consideration the existence of Title I funds. The net effect is the same as that in LEA No. 4: Title I eligible schools and children, taken as a whole, are not penalized, though some actual participants in Title I programs receive $150 less SCE funds.

We concluded that LEA No. 5's approach complies with the law because the purpose of the supplement, not supplant and "equitably provided" requirements, which is to prevent educationally deprived children residing in Title I eligible areas from being penalized in the distribution of SCE funds, does not require LEAs to completely ignore Title I funds when they distribute SCE funds so long as penalization does not result. LEA No. 5 has not penalized educationally deprived children residing in Title I areas since

LEA No. 5 could have provided, without objection, the identical supplementary services to Title I children with Title I and SCE funds simply by accounting for them as did LEA No. 4. Consequently, no discrimination against Title I eligible children resulted from the fact that LEA No. 5 took Title I funds into consideration in distributing SCE funds. For good reasons OE has not distinguished between these two situations.

Graphically, the reasonableness of OE's policy is described below. Note that in both LEAs, each child receives $300.00 in compensatory education funds.[126]

Title I Eligible Schools

	LEA No. 4		LEA No. 5		
	A		A		
	Title I	$300	Title I	$150	= $300
	SCE	0	SCE	$150	
	B		B		
	Title I	0	Title I	$150	= $300
	SCE	$300	SCE	$150	

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[126] Also note that in LEA No. 5 all schools eligible for Title I are receiving Title I funds and are thus subject to all Title I requirements, including the parent involvement requirement. In contrast, some schools in LEA No. 4 are not receiving any assistance under Title I and therefore are not subject to certain Title I requirements. This issue is developed more fully in Chapter 9.

To protect LEA No. 5 from potential liability stemming from the possibility that a court might interpret the statute and implementing regulations differently than OE, we recommend that the statute be clarified by an amendment which would provide that notwithstanding Section 141(a)(3)(B) of Title I (the supplement, not supplant requirement) an LEA, at its option, may take into consideration the existence of Title I funds in distributing SCE funds, provided that (a) state and local special program funds for educationally deprived children are distributed according to objective criteria, (b) educationally deprived children, taken as a whole, who reside in low-income areas are not penalized in the distribution of such funds and, at a minimum, such funds are equitably provided to such children and (c) educationally deprived children residing in low-income areas who are or would have been considered program participants under Title I, but for the existence of the SCE program, receive the same nature and scope of services under the SCE program as would otherwise have been provided under Title I.[127]

To demonstrate compliance with the statutory provisions proposed above, we recommend each LEA explain in its application how it plans to comply with the supplement not supplant and equitably distributed provisions and include in its Title I application, at a minimum, the following information:

127/ This issue is more fully developed in Chapter 9.

> (1) the objective criteria used as the basis for distribution of funds under SCE programs;
>
> (2) the types of services to be provided with SCE funds;
>
> (3) the total number of students in each school who are eligible under the objective criteria identified in (1);
>
> (4) the total amount of SCE funds distributed to each school;

3. Unacceptable Fund Distribution Plans

a. Combining SCE and Title I funds in a way that ignores the proportional distribution requirement--LEA No. 6--The same factual assumptions are made with respect to LEA No. 6 as were made about LEAs 4 and 5 (see supra, p. 249). LEA No. 6, desiring to serve all children in the district eligible for the SCE program, i.e., Q_1 children in grades K-6 irrespective of their residency, employs the following approach. Recognizing that $150,000 are required to provide services to its 500 eligible elementary children, the LEA combines the $75,000 in SCE funds with $75,000 of Title I funds to obtain the needed $150,000. The $150,000 are used to provide $300 in services to each child eligible to participate in the compensatory education program. $75,000 in Title I funds and $45,000 in SCE funds are used to serve the 400 children in Title I areas who are eligible for the program. The remaining $30,000 in SCE funds are used to serve the 100 eligible children in non-Title I areas.

Under this procedure, the educationally deprived children in Title I areas, taken as a whole, receive only 60 percent of the SCE funds rather than the 80 percent which the children residing in Title I attendance areas in LEAs No. 3 and No. 4 above received in accordance with the proportional distribution requirement. ($45,000 in LEA No. 6 versus $60,000 in both LEAs 4 and 5).

The policy of combining or pooling Title I and SCE funds by the fifth LEA in the example above is, in our opinion, inconsistent with the current statute, regulations, and OE interpretations. The LEA, in distributing SCE funds, has, in fact, penalized eligible children residing in Title I project areas. $15,000 in SCE funds which, but for the existence of Title I, would have been provided to the Title I project areas, have been allocated instead of non-project areas.

The penalization of children residing in low-income areas resulting from pooling Title I and SCE funds in a manner that ignores the proportional distribution requirement is similar to the penalization of such children by LEA No. 2, described in a previous example. The funding scheme used by LEA No. 2 (p. 242) was deemed illegal because the LEA, which was required to distribute SCE funds to schools according to their incidence of educational deprivation skipped schools eligible for Title I, resulting in Title I paying for services which SCE would have paid for in those schools, but for the existence of Title I.

Given that the procedures used by LEAs No. 2 and No. 6 are illegal, the question remains whether the law should be changed to allow practices such as skipping schools which would have received assistance under a SCE program and pooling Title I and SCE funds.

This issue involves the accommodation of the Title I policy of serving educationally deprived children residing in low-income areas and a state or local policy of serving educationally deprived children wherever they may side.

The requirements pertaining to supplement, not supplant and equitably provided strike a balance between these two policies. They encourage states and LEAs to provide SCE programs to educationally deprived children both (a) who live in Title I eligible areas but are not served because of insufficient Title I funds and (b) who live in ineligible areas. Supplement, not supplant and "equitably provided" simply require that Title I eligible children, as a group, receive their fair share of SCE funds in accordance with objective, non-discriminatory criteria established by the state or the LEA.

Because Title I is not fully funded many educationally disadvantaged children in low-income areas receive no Title I services. Without these requirements, SCE programs could ignore completely these unserved children and could serve only children in areas not eligible for Title I programs. Elimination of the supplement, not supplant and equitably provided requirements would create an incentive (a) to provide state and local supplemental programs only in areas ineligible for Title I and (b) to use Title I funds to provide the same supplementary services in Title I areas. Such a policy would deprive children who are eligible for but do not receive Title I services of access to state and locally funded supplementary programs. The supplement, not supplant and equitably provided requirements assure that a state or LEA does not discriminate against such children in the provision of supplementary programs to educationally disadvantaged children. These requirements do _not_ demand that SCE programs serve the same children or have the same objectives as Title I, but they do require _accommodation_ of a primary goal of Title I: providing _supplementary_ services for educationally disadvantaged children _residing in low-income areas_. Title I was not intended to provide merely those services educationally disadvantaged children would have received from SCE programs, if Title I did not exist.

E. LEA No. 7: An LEA Expending Substantial Sums for Compensatory Education

In this example, we will assume that there are some levels of supplementary services and funds which would enable an LEA to provide programs of sufficient size, scope and quality to meet _all_ the special educational needs (an optimally sufficient program) of _all_ educationally deprived children in grades K-12, in both Title I and non-Title I areas. We will assume (a) that LEA No. 7 raises or obtains SCE funds in an amount which, when added to the Title I allocation actually received, reaches such a level and thus enables the LEA to provide all educationally deprived children, K-12, with a fully sufficient supplementary program, and (b) that the LEA desires to provide all educationally deprived children in all schools (Title I and non-Title I) with such a program.

When the equitably provided requirement is applied to an LEA meeting assumptions (a) and (b) above, the following unintended consequences result. First, the LEA will not be able to serve all educationally deprived children residing in non-Title I areas with SCE funds. Second, in Title I areas, the LEA will have Title I funds in excess of the amount necessary to provide a program of optimal sufficiency for all Title I eligible children. This result is a mathematical consequence of the total amount of funds (Title I and SCE), for supplementary services for all disadvantaged children in an LEA (K-12) approaching a level adequate to provide a program of optimal sufficiency. The existence of this result acts as a disincentive for an LEA to attempt to provide all educationally deprived children with an optimally sufficient program.

The following example illustrates this disincentive.

Assumptions

(1) The present Title I allocation is $200,000;

(2) The present SCE allocation is $300,000;

(3) There are 1,000 educationally disadvantaged children in grades K-12, i.e., functioning below the 50th percentile. 800 are in Title I areas; 200 are in non-Title I areas. They are distributed by schools as follows.

Title I		Non-Title I	
200	200	50	50
200	200	50	50

(4) If Title I were fully funded the LEA's entitlement would be $400,000, or $500 per Title I eligible child ($400,000 ÷ 800 children);

(5) $500.00 per child would provide an optimally sufficient compensatory education program. 128/

(6) The amount required to provide all educationally disadvantaged children with $500 in supplementary services is $500,000 (1,000 children x $500).

(7) With the $500,000 available from Title I and SCE, the LEA wants to provide a $500 supplementary program to all educationally disadvantaged children.

When the equitably provided requirement is applied the following calculations must be made:

- Since 800 of the 1,000 educationally deprived children reside in Title I areas, 80 percent ($240,000) of the $300,000 in SCE funds must be used for Title I eligible children. The remaining $60,000 may be used in non-Title I areas.
- Thus, there are sufficient SCF funds to provide 480 Title I children with a $500 per child program ($240,000 ÷ $500 = 480).
- There are sufficient SCE funds to provide 120 educationally deprived children in the non-Title I area with a $500 per child program ($240,000 ÷ $500 = 120).
- Now that SCE funds have been equitably distributed, Title I funds are allocated to the remaining 320 educationally disadvantaged children in Title I areas.

128/ The $500.00 figure was arbitrarily selected by the LEA as constituting an optimally sufficient program as distinguished from a program that is necessary to meet minimum notions of sufficiency. The problems of objectively defining what constitutes an "optimally sufficient program are described *infra* at P. 265 of the text.

The amount of Title I funds needed to provide a $500 per pupil program for these 320 children is $160,000. This leaves $40,000 of Title I funds unused. 129/

- $40,000 is the exact amount needed to provide a $500 per pupil program to the remaining 80 educationally disadvantaged in non-Title I areas who receive no SCE funds ($30,000 ÷ 500 = 80).

If the equitably provided requirement had not been applied in step 1 above, but rather the LEA had been permitted to combine SCE and Title I funds, the LEA would have been able to provide a compensatory education program in the amount of $500 per pupil for every educationally disadvantaged child in grades K-12. The calculations are as follows:

- The total amount available from Title I and SCE equals $500,000.
- The total number of eligible children in the district is 1,000.
- By dividing $500,000 by the $500 figure, it is clear that all 1,000 educationally deprived can receive a compensatory program in the amount of $500 per pupil.

129/ If all Title I funds are used for Title I eligible children, $50 additional per Title I child would be available to provide a total Title I-SCE program for Title I children in the amount of $550 per child.

In earlier parts of this chapter, we showed that the supplement, not supplant and equitably provided requirements operate to ensure that SCE funds are used to provide supplementary services not only to educationally disadvantaged children in areas ineligible to receive Title I funds, but also to children who are eligible to receive Title I funds, but do not receive them because Title I is under-funded. However the example above illustrates that when the total amount of Title I and SCE funds is sufficient to provide an optimally sufficient program for all Title I eligible children, the further application of the supplement, not supplant and equitably provided requirements means that Title I children will receive a program that is above this level and other educationally disadvantaged children not residing in eligible areas will be funded below this level. The practical effect of this may be to provide a disincentive for states and LEAs to increase SCE funding, once the amounts of Title I and SCE funds used in Title I eligible areas reaches this level.

In fashioning a recommendation the question remains whether it is possible to objectively define an "optimally sufficient" program? We profess no expertise concerning what levels of funds and services would provide a program so well funded that additional funds could not be effectively used to enhance the educational opportunities of educationally disadvantaged children. We are aware of no body of information which would enable this level of optimal sufficiency to be determined.[130/] Nor are we aware of states or school districts which claim to provide this level for all educationally deprived children. This level of optimal sufficiency may be substantially higher than the program level provided in any school district. However, we need not resolve this issue since the purpose of this example is simply to illustrate a problem resulting from the application of the supplement, not supplant and equitably provided requirements when an LEA's combined SCE and Title I funds approach this level of sufficiency, wherever the threshold may be.

[130/] Moreover, since costs and programs differ among schools, districts and states, and "educationally disadvantaged children" have a wide range of different problems, no single dollar figure per pupil or ratio of supplementary funds to base funds is likely to reflect this level for all children or groups of children.

Since we doubt that the tools exist to establish such a level beyond dispute, we are not particularly concerned that an LEA, because of the supplement, not supplant and equitably provided clauses would be required to provide Title I children with funds in excess of the amount necessary to provide a program of "optimal sufficiency." We are more concerned that at some point an LEA or state may feel a disincentive to increase outlays further for SCE programs, due to the fund distribution requirements of these clauses. The points at which different states and LEAs may begin to feel this disincentive will be as varied as the different opinions educators might have concerning the level of funds needed to provide an optimally sufficient program. Given the uncertainty of any measure of an optimally sufficient program, but given the desire of Congress to encourage growth of SCE programs, at which point should federal policy recognize the existence of a growth disincentive and include express provisions to counteract it?

In our view, this point should be when the combined level of SCE and Title I funds employed in the Title I areas of an LEA reaches a level equal to that authorized [131] by Congress for Title I in that LEA. At that point the continued application of the supplement, not supplant and equitable distribution requirements means that an LEA must use amounts of SCE funds in Title I areas, which when combined with the Title I funds in those areas, exceed the level of funds which the federal government, itself, is willing to authorize for compensatory education in those areas. This is a practical point at which, from a policy perspective, states and LEAs may feel that the federal government is asking them to do more for Title I areas than Congress, itself, has determined should be done. Thus, states and LEAs may, for this reason, feel a disincentive to increase the growth of their SCE programs.

We do not suggest that the Congressional authorization for Title I can be empirically validated as providing an optimally sufficient education for educationally deprived children. Our selection of this standard is based on the policy considerations stated above and the recognition that at some point there is a need for a federal provision counteracting the disincentive states and LEAs may feel.

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[131] Not the amount actually appropriated, but the amount authorized to be appropriated.

Thus, we recommend that once the total of SCE and Title I funds used in Title I eligible areas reaches the level of the fully funded Title I authorization, the LEA should be exempt from the supplement, not supplant and equitably provided requirements with respect to the distribution of additional SCE funds used to bring supplementary programs in non-Title I areas up to this same level (measured by dollars per educationally deprived child served by the supplementary program in Title I eligible areas).[132] Above this level of supplementary funds per pupil, SCE funds would again, be subject to the supplement, not supplant and equitably provided requirements.

---

[132] Of course, new provisions implementing this exemption should include standards which ensure that the state funds deemed to qualify an LEA for this exemption are in fact SCE funds providing services "comparable" to Title I. The standards necessary to accomplish this result are discussed in Chapter 7 of this paper. Also, the proceudres we recommend in Chapter 7 for ensuring compliance with these standards are fully applicable to our recommendation here and should be so applied. In passing, we should also note that the LEA should not be exempt from Title I comparability requirements. Only the SCE funds should be excluded from comparability computations (see Chapter 7). Other state and local funds and services should continue to be subject to comparability requirements to ensure that no discrimination in base funding occurs.

Under the terms of this recommendation, LEA No. 7 would qualify for an exemption from the supplement, not supplant and equitably provided provisions because the amount authorized for it by Congress is $400,000 and because the LEA provides a supplementary program in the amount of $500 per child for all 800 Title I eligible children, K-12 (800 x $500 = $400,000).

The question remains whether an LEA (LEA No. 8) should qualify for an exemption from the supplement, not supplant and equitably provided provisions with respect to the distribution of SCE funds where (a) it satisfies the fully-funded standard described above, but (b) like LEA No. 6 (from the previous example) provides a comprehensive supplementary program only for a particular grade span, e.g., K-6?

Under the terms of our recommendation, LEA No. 8 would qualify for the exemption. The rationale for allowing the exemption for LEA No. 8 (which, like LEA No. 7, satisfies the fully-funded standard) and not allowing an exemption for LEA No. 6 (which does not satisfy the fully-funded standard) is identical to the rationale for allowing an exemption for LEA No. 7. Both LEA No. 7 and No. 8 provide supplementary services to Title I eligible children in the amount that Congress had determined should be provided under Title I, i.e., the total amount authorized by Congress for the LEA. LEA No. 6 does not. We recognize that in both LEA No. 6 and No. 8 some Title I eligible children in grades 7-12 are not served. The failure to serve all eligible children was the basis for not recommending that LEA No. 6 be exempt from the supplement, not supplant and the equitably provided clauses. However, in the fully-funded situation, LEA No. 8, if not exempt, would be required to provide a higher level of supplementary services in Title I areas than Congress itself has determined should be provided. An LEA which decides to use the total amount authorized by Congress for a particular grade span (e.g., K-6) instead of for all children in grades K-12, is no less entitled to an exemption. LEA No. 8, which has defined an "optimally sufficient program" at a higher level per pupil than LEA No. 7, is equally deserving of an exemption as LEA No. 7.

Our recommendation for an exemption from the supplement, not supplant and equitably provided clauses is based on Title I's long history of underfunding and the incentive this recommendation would create for states and LEAs to close the gap between amounts appropriated and authorized for Title I. At such time as Title I is fully funded, or nearly so, this incentive will no longer be needed, and should be reviewed,133/ and probably terminated since full funding of Title I would eliminate the justification for our proposal (Our proposal's effect at that point would be solely to encourage states and LEAs to discriminate against Title I

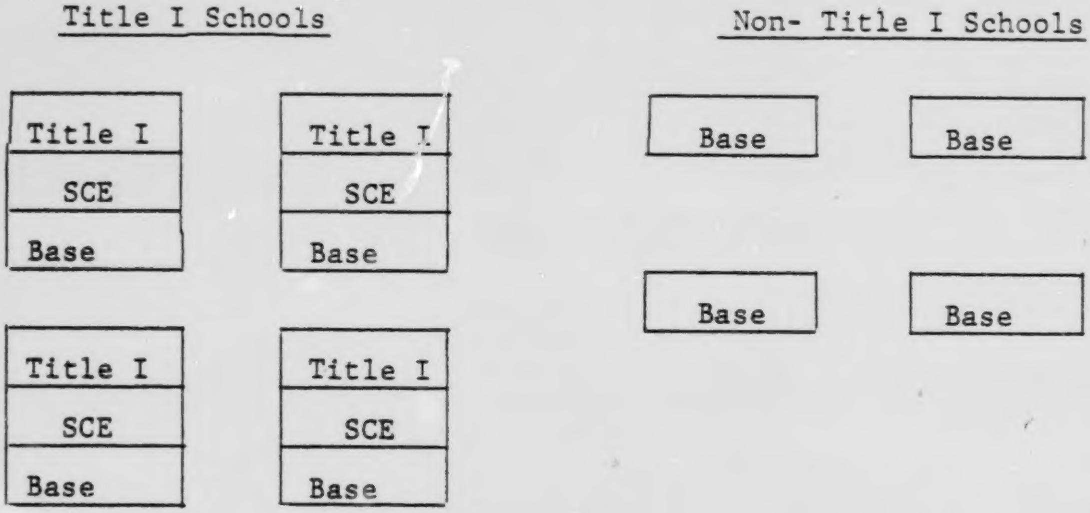
133/ This would include an examination of the need for funds above the level of Title I's authorization for educationally deprived children. See also the discussion in note 129, supra.

eligible children in the allocation of SCE funds.)

Because this exemption is designed as an incentive to fund supplementary programs in non-Title I areas at the same level that Title I if fully funded, would provide in Title I areas, once this level is achieved in non-Title I areas, no further exemption is warranted. Exempting SCE funds above the level specified in the previous sentence would permit an LEA to discriminate against Title I areas by providing a higher level of supplemental services to non-Title I areas. Consequently our recommended exemption terminates at the point that SCE funds provide supplementary services in non-Title I areas at the same level that Title I, if fully funded, would provide per served pupil in Title I eligible areas. Additional SCE funds would be subject to the supplement, not supplant and equitably provided requirements.

Also, if our proposed exception to these requirements were continued when Title I is fully funded, it would have the deleterious effect of encouraging LEAs to take funds from the base and use these in SCE programs that serve only children ineligible for Title I services -- an effect which the equitably provided, supplanting and comparability requirements are designed to prevent.

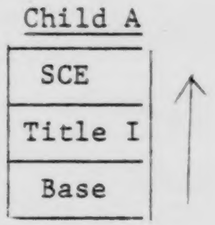
F. State Compensatory Education Funds Provided Only In Title I Schools


Title I Schools
Non- Title I Schools
Title I
SCE
Base
Title I
SCE
Base
Base
Base
Base
Base
Title I
SCE
Base
Title I
SCE
Base

In this situation all SCE funds are distributed to children attending Title I schools. Although educationally deprived children residing in non-Title I areas receive no SCE funds, there is no violation of the supplement, not supplant or equitably provided provisions. Since the primary purpose of these provisions is to ensure that Title I funds are supplemental and not used to supplant state and local funds, they only protect Title I areas and program participants from discrimination. The purpose is not to require intra-district equality, although that may be one of its effects. Thus, the federal statute does not prohibit states from providing "overly-favorable" treatment to the participants in Title I programs.

G. State Provisions Requiring SCE Funds To Supplement and Not Supplant Federal Funds

In this example, assume that the SCE legal framework provides, in part, that "a district shall use the state funds for *specifically identified students* to *supplement and not supplant the use of federal monies*." To comply, the LEA, would allocate to a particular child, state and local base, Title I funds and SCE, in that order:



Ostensibly, this provision is intended to ensure that *children* receiving Title I funds also receive their fair share of SCE funds; rather than using SCE funds to meet the needs of children eligible for but not receiving assistance under Title I. If so, the intended effect of this provision is consistent with the basic purpose of the Title I legal framework which is to prevent penalization. But the language of this state requirement that federal Title I funds be distributed before state compensatory education funds is inconsistent with the Title I requirement that state compensatory education funds be distributed first, *without regard* to the availability of Title I funds.

This problem has the same derivation as that encountered by LEA No. 5 *supra*: the phrase "without regard to." Rather than requiring LEAs to "ignore" or "disregard," Title I funds, the supplement, not supplant and "equitably provided" provisions should be clarified as suggested supra,. so as to ban only penalization of, or discrimination against, Title I areas or project participants. As we have shown, supra., an LEA can, in certain circumstances, take Title I funds into account in the distribution of SCE funds without penalizing Title I eligible children. The regulations and statute should make clear that so long as penalization does not result, taking into account Title I funds should be permitted.

CHAPTER 9

TITLE I REQUIREMENTS CONCERNING THE TARGETING OF SCHOOL ATTENDANCE AREAS AND CHILDREN AND STATE COMPENSATORY EDUCATION PROGRAMS

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TITLE I REQUIREMENTS CONCERNING THE TARGETING OF SCHOOL ATTENDANCE AREAS AND CHILDREN AND STATE COMPENSATORY EDUCATION PROGRAMS

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CHAPTER 9

TITLE I REQUIREMENTS CONCERNING THE TARGETING OF SCHOOL ATTENDANCE AREAS AND CHILDREN AND STATE COMPENSATORY EDUCATION PROGRAMS

I. Introduction

The primary purpose of Title I is to provide supplementary programs to meet the special educational needs of educationally deprived children residing in areas having high concentrations of children from low-income families.[134]

To ensure that Title I programs best meet the needs of the intended beneficiaries, i.e., "educationally deprived children" residing in areas "having high concentrations of children from low-income families," the regulations promulgated by OE contain eligibility and targeting requirements.[135] The eligibility requirements specify the schools within a district eligible to receive funds and the children in those schools eligible to participate in Title I programs. The targeting requirements establish criteria for selecting. from the list of eligible schools and children, those that will actually participate in Title I programs. Since Congress has never fully funded Title I, funds have generally been insufficient in most school districts to design comprehensive programs for all eligible areas and for all eligible children. This has been true since the inception of the program.

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[134] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A) (emphasis added).

[135] For a detailed description and analysis of these requirements, see the Project's paper cited to supra, n. 11.

The purpose of this chapter is to analyze the relationships between state compensatory education programs and the Title I eligibility and targeting requirements pertaining to school attendance areas and children. In addition, this chapter analyzes how these interrelationships affect the Title I requirements pertaining to private school participation, parent involvement and comparability.

II. The School Attendance Area Eligibility and Targeting Requirements of Title I

A. Overview of the Federal Legal Framework

1. The General Rules Concerning School Attendance Area Eligibility and Targeting

Not all areas within a school district are eligible to receive assistance under Title I. The legislation provides that Title I funds are to be used by LEAs for programs and projects "which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families." [136]

---

[136] Section 141(a)(1)(A) of Title I (20 U.S.C. 241e(a)(1)(A)).

According to the regulations issued by OE, the LEA may use either of two basic methods for determining which school attendance areas within a district are considered as "having high concentrations of children from low-income families." Under the first method, only those school attendance areas whose percentage of children from low-income families is as high as the district-wide average are eligible to participate in Title I programs ("percentage method"). Under the second method, only those school attendance areas in which the number of such children is as large as the average number of such children per attendance area in the district are eligible ("numerical method").

Specifically, the regulations provide that a school attendance area is eligible to participate in a Title I program if:

> (1) the percentage of children from low-income families in that attendance area is at least as high as the percentage of such children residing in the whole of the school district[137]
>
> (2) the estimated number of children from low-income families residing in that attendance area is at least as large as the average number of such children residing in each of the several school attendance areas in the school district.[138]

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[137] 45 C.F.R. §116a.20(b)(2)(1976).

[138] 45 C.F.R. §116a.20(b)(3)(1976).

In addition, the regulations permit an LEA to have some areas ranked on one basis and some on the other. However, if a combination of the methods is used, "the number of attendance areas actually designated...may not exceed the number of such areas that could be so designated if only one such method had been used."[139]

The Title I legislation also provides that payments under Title I may be used for programs and projects "which are of sufficient size, scope, and quality to give reasonable promise of substantial progress"[140] toward meeting the needs of educationally deprived children in low-income areas.

In school districts in which it is not possible to comply with the above statutory requirement and at the same time serve all educationally deprived children in all eligible attendance areas, the regulations include specific rules for selecting the children and the areas which are to receive special assistance under Title I. The regulations explain that the above statutory provision may be satisfied either by limiting the number of children or areas. This section describes the rules pertaining to targeting school attendance areas. The next section describes the rules pertaining to targeting children.

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[139] 45 C.F.R. §116a.20(b)(4)(1976). (Emphasis added.) Additional options available to LEAs for determining area eligibility are described in the Project's papers cited to *supra*, n. 11.

[140] Section 141(a)(1)(B) of Title I (20 U.S.C. 241e(a)(1)(B)).

The general rule for selecting the project areas to target from among all eligible areas is commonly referred to as the "no-skip" provision. This "no-skip" provision establishes priorities for the selection of attendance areas. In general an LEA may not designate a school attendance area as a project area "unless all attendance areas with a higher percentage or number of children of low-income families...have been so designated."[141] However, there are three exceptions to the general rule. These exceptions are described below.

2. Three Exceptions to the General Rule For Targeting School Attendance Areas

a. Schools Deemed Eligible in Accordance with the "Formerly Eligible" Rule--To maintain a degree of continuity, a school designated as a project area school in a previous year may continue to be so designated for an additional two years even if it is no longer ranked as one school with the highest number or percentage of children from low-income families.[142] This exception is commonly referred to as the "formerly eligible" rule.

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[141] Program Guide No. 44, Section 4 6 and 45 C.F.R. §116.17(f)(1975), now at 45 C.F.R. §116a.20(c) (1976) and 45 C.F.R. §116a.21(e)(1976).

[142] 45 C.F.R. §116a.20(g)(1976).

b. Substantially Higher Incidence of Educational Deprivation in Lower Ranked Schools--An LEA may also skip a higher ranked school if a lower ranked school has a "substantially" higher incidence of educational deprivation. Specifically, the regulations provide that a higher ranked school may be skipped

> if such agency can demonstrate, to the satisfaction of the State educational agency, that the incidence and severity of educational deprivation in [the area having a higher incidence of low-income families] is substantially less than in other attendance areas proposed to be designated. 143/

Under the circumstances described above, a "skipped school" may not be included in the non-project area average for purposes of computing comparability[144] and the LEA must demonstrate that the skipped school is comparable, in fact, to the non-project area school average. Specifically, the regulations provide that the SEA, before it allows an LEA to take advantage of this exception, must first determine that

> the services provided with State and local funds in any area which has a higher percentage or number of children of low-income families but which is not designated for a project area are comparable to the services provided in other areas not designated. 145/

143/ 45 C.F.R. §116a.20(c)(2)(1976).

144/ The Title I comparability provision is described supra, in Chapter 7.

145/ 45 C.F.R. §116a.20(c)(2)(1976).

If an SEA does not first make this required determination, then it cannot approve such a LEA request for an exception.

c. Schools Receiving the Same Nature and Scope of Services From State Sources as Would Otherwise be Provided Under Title I--Finally, a LEA may skip a higher ranked school attendance area if it has been designated "to receive (through the use of funds from other sources) services of the same nature and scope as those that would otherwise be provided under Title I," e.g., state compensatory education funds.[146]

B. Policy Analysis, Conclusions and Recommendations

1. Introduction

This section of the paper analyzes the meaning of the requirements pertaining to (a) children attending private schools, (b) parent involvement, and (c) comparability in light of the exemption from the no-skip provision for school attendance areas receiving services under a SCE program of the same nature and scope as would otherwise have been provided under Title I.

---

[146] 45 C.F.R. §116a.20(c)(1)(1976). The exemption from the "no-skip" rule is more exacting than the SCE exemption from the comparability ratios. See *supra*, chapter 7.

2. The Private School Issue

By statute, LEAs must include educationally deprived children attending private schools in Title I programs.[147] Title I programs for private school children must meet certain Title I requirements, including the school attendance area eligibility provisions which restrict Title I programs to educationally deprived children residing in school attendance areas having high concentrations of children from low-income families. OE regulations further define the private school children that Title I must serve: "educationally deprived children [attending private schools] who reside in the public school attendance area or areas designated as the project area."[148] In other words, the residency of a child attending a private school rather than the location of the private school determines the private school children eligible to participate. Additionally, since not all attendance areas eligible for Title I programs may be designated project areas, only the educationally deprived private school children residing in areas designated as project areas may be participants in Title I programs.

As explained above, the regulations provide that an attendance area with a higher incidence of children from low-income families can be skipped when a LEA selects Title I project areas if the LEA provides in the attendance area which has been skipped a SCE program offering services of the same nature and scope as would otherwise have been provided under Title I.[149] The central issue with respect to project area targeting and private school children arises when the SCE program does not provide services to private school children. In this situation, can it be said that the services provided by the SCE program are of the same nature and scope as would otherwise have been provided under Title I--since Title I would have provided services to private school children? We have concluded that the answer is "no" since the entire trust of Title I is to benefit the educationally deprived children residing in poor areas rather than the public or private schools which they attend. Consistent with this structure, the regulation authorizing this exception to the no-skip rule for SCE programs of the same nature and scope refers to residency in "school attendance areas" rather than simply to children attending the "public schools".

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[147] Section 141A of Title I (20 U.S.C. 241e-1).

[148] 45 C.F.R. §116.19(a)(1974); now at 45 C.F.R. §116a.23(a) (1976). The term "project area" is defined in 45 C.F.R. §116a.2(1976) to mean "an attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the locality of the project itself, is designated as an area from which children are to be selected to participate in a project."

The consequences of the conclusion that SCE programs not serving private school students do not provide services of the same nature and scope that would otherwise be provided under Title I are not expressly set forth in the existing regulations. One possible interpretation is that a LEA could not skip either public or private school children in the higher ranked attendance area receiving SCE funds, i.e., the failure of a SCE program to serve private school children would render inoperative this exception to the no-skip rule. Another interpretation is that the LEA could, on the one hand, skip the educationally deprived children attending the public schools in the higher ranked attendance area--since these educationally deprived children receive a SCE program of the same nature and scope as Title I--but, on the other hand, could not skip the private school children who reside in the attendance area, since they are ineligible for SCE funds. This would mean that the educationally deprived children attending the public school could be skipped. However, the school attendance area in which the children normally served by that school reside will still be considered a "project area" with respect to its educationally deprived children attending private schools.

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[149] See supra, at p. 281.

Neither the Title I statute nor present regulations expressly consider this issue. However, in our opinion, it would be consistent with the intent of this exception to the no-skip provision to permit a LEA to skip only children attending public schools in a high ranked attendance area, while continuing to use Title I funds for the private school children residing therein. The purpose of requiring SCE programs to be of the same nature and scope as Title I as a condition to invoking the exception is to ensure that children in attendance areas containing a high incidence of low-income families are given a higher priority in the allocation of limited supplemental funds than children residing in attendance areas with lower concentrations of poverty. Where SCE funds provide public school children in high ranked areas with services Title I would have provided and private school children in those attendance areas receive the Title I services to which they are entitled, all educationally deprived children in the attendance area receive the high priority anticipated by the no-skip provision and "same nature and scope" exemption.

The present regulations, however, do not indicate whether an LEA would be justified in applying the analysis described in the above paragraph, or would be precluded from skipping any attendance area in which private school children are not served by SCE programs. Consequently, we recommend that the regulations be amended to clarify that in cases in which SCE programs provide only public school children with services of the same nature and scope as those that would have been provided under Title I, the educationally deprived children attending public schools in high ranked attendance areas can be skipped. However, the school attendance areas in which these children reside must still be designated project areas with respect to the provision of Title I services to the private school children residing therein.

A second issue may arise with respect to the level and type of services to which children attending private schools are entitled. The Title I legislation provides that a LEA must provide for the participation of educationally deprived children attending private schools on an "equitable bases."150/

150/ Section 141A(b)(2) of Title I (20 U.S.C. 241e-1(b)(2)).

Present regulations add that children attending private schools must receive services "comparable" to those provided to "public school children with needs of equally high priority."[151] In the situation described in the preceding paragraph, public school children with "needs of equally high priority" may be served only by SCE programs and not by Title I. The regulation requiring comparable services for private school children does not distinguish between public school children served by Title I and SCE. If children attending high ranked public schools are skipped because the SCE program provides assistance of the same nature and scope as would have been provided under Title I, what is the appropriate standard of comparison? It is our opinion that the standard of comparison for the services which must be provided to private school children, are the services provided public school children whose needs are of equally high priority irrespective of whether the public school children are served with Title I or SCE programs.

The question of how many children in private schools must receive assistance under Title I is answered in the same manner as the issue of comparable services discussed in the above paragraph. The LEA must treat children attending private schools in an equitable manner and provide them with the assistance they would receive if only Title I funds had been used for both the public and private school children in that attendance area. However, the SCE services which public school children in that attendance area receive must be of the same nature and scope as would have been provided under Title I; thus, the SCE program in the attendance area must be the frame of reference, and the proportion of children with the types and severity of educational handicapps which the SCE program serves in the public schools in a given attendance area should be the standard for determining the number of private school children in the attendance area which must be served.

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[151] 45 C.F.R. §116a. 23(b) and (c) (1976).

3. The Parent Involvement Issue

In accordance with Section 141(a)(14) of Title I (20 U.S.C. 241e(a)(14)) each school served by a program or project must establish a school-level parent advisory council (SAC). The regulations (45 C.F.R. §116a.25(a)(1) (1976)) add that the LEA must demonstrate in its application that the SAC "has, as a majority of its members, parents of children (including parents of private school children) who are currently participating or who will participate in projects proposed for the following year."

This subsection of the paper analyzes the meaning of these requirements in light of the exemption to the no-skip provision for SCE programs providing services to educationally deprived children of the same nature and scope as would otherwise have been provided under Title I. The specific issues raised are set forth below.

(1) If a LEA qualifies for the exemption, must it nevertheless establish a SAC in a school that is skipped by Title I because it is served by a SCE program?

(2) If a LEA satisfies the criteria for skipping with respect to children attending public schools but not with respect to children attending private schools, must the LEA establish a SAC at the public schools receiving SCE in lieu of Title I funds? If so, what should be the scope of the SAC's responsibilities?

We conclude that if a school attendance area, which would have been targeted under Title I, is skipped because a SCE program provides services of the same nature and scope as would have been provided under Title I, the present Title I legal framework does not require a school level parent advisory committee at the skipped school. Only Title I project area schools must have school advisory committees.

The federal government has the right to condition the receipt of federal funds on the recipient complying with reasonable conditions. But we have not analyzed the power of Congress to require LEAs to establish SACs at all schools in an LEA, irrespective of whether they receive Title I funds, and Congress, to date, has not sought to adopt such a requirement.

It would be possible for an LEA to eliminate an effective school level advisory council by switching the source of a school's compensatory education funding from Title I to SCE, thereby eliminating the parent involvement requirement for that school. We do not know whether funding sources have been juggled for this purpose. However, to the extent this is a problem, OE could require that as a condition precedent to skipping a high ranked attendance area, the SCE program, to be considered similar in nature and scope, include a parent involvement component similar to Title I's.

With respect to the second question, we conclude that a LEA must establish SACs at public schools serving attendance areas which receive assistance under a SCE program in lieu of Title I for public school children but not for children attending private schools. However, the SAC's responsibility would be limited to providing advice with respect to the Title I program for children attending private schools and not with respect to the operation of the SCE program.[152]

Section 141(a)(14) of Title I requires that a SAC must be established at "schools...served by a program or project." This must be read in connection with another section of the statute which requires that control of all Title I funds, including funds used to meet the needs of children attending private schools, must rest with the LEA.[153] The statute must be construed to mean that SACs are to be established only at public schools, with whom the control of Title I funds rests, for the purpose of advising the school with respect to the expenditure of funds for Title I programs and projects--including the use of Title I funds for private school children.[154]

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[152] Although it would be more reasonable for this SAC to be attached to the private schools receiving Title I funds, such a result is probably precluded by constitutional problems with respect to "entanglement" between the federal government and parochial schools.

[153] Section 141(a)(3)(A) of Title I (20 U.S.C. 241e(a)(3)(A)). See also 45 C.F.R. §116.42(1976). These requirements also result from church-state considerations.

[154] Indeed, the conception of Title I is that it benefits disadvantaged children who attend private schools, rather than the private schools themselves. The design was also to avoid church-state entanglements and separation problems.

In general, the scope of the SAC advisory function is determined by the scope of the Title I program in a particular attendance area. Thus, where the Title I program serves only private school children in an attendance area, the scope of the SAC's advisory function is only with respect to the Title I program in private schools.[155]

The above analysis concerning the role of the SACs in attendance areas in which Title I serves only private school children is derived from statutory and regulatory provisions which have not explicitly treated this issue. We recommend that OE regulations expressly set forth the policies described above.

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[155] Of course, an LEA could entrust such an SAC with an advisory or other role with respect to the SCE program in the public schools serving the attendance area, but this broader role is not required by Title I.

4. The Comparability Issue

Section 141(a)(3)(C) of Title I (20 U.S.C. 241e(a)(3)(C)) provides that "state and local funds" must be used "to provide services in project areas . . . comparable to services provided under Title I. The revised regulations, 45 C.F.R. §116a.26(1976) provide that a LEA must demonstrate that services provided with state and local funds derived from public sources in project area schools are at least comparable to services provided in non-project area schools.

This subsection of the paper addresses the question whether the regulations should be amended to require that a LEA demonstrate that the base services provided to a high ranked Title I school which is skipped because it is receiving compensatory education services under a SCE program of the same nature and scope as would otherwise be provided under Title I is comparable to the base services provided in other area schools not receiving assistance under Title I? The present Title I regulations do not require such a demonstration.

We recommend that LEAs, to satisfy the "same nature and scope proviso" must demonstrate, among other things, that a skipped school receiving SCE in lieu of Title I funds, is comparable to the other non-project area schools in the district.[156]

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[156] As explained *supra*, in Chapter 7 concerning the relationship between SCE programs and the Title I comparability requirement, a SCE program must satisfy four criteria to qualify for an exemption. One criterion is that the SCE program must provide supplementary services for educationally deprived children. Thus, if SCE funds are simply used to reduce disparaties

This recommendation is not exceptional in any sense of the word. Recall that under the revised regulations OE permits a LEA to skip a high ranked school attendance area if a lower ranked area has a substantially higher incidence of educational deprivation. But, to qualify for this exemption the LEA must demonstrate that the services provided to the skipped school are comparable to the services provided to other areas not designated as project areas. Thus, we are simply recommending that the condition included in the exception for high ranked schools having substantially lower incidencies of educational deprivation be made applicable to high ranked schools receiving services under a SCE program of the same nature and scope as would otherwise have been provided under Title I.

The following example illustrates why it is essential to the integrity of Title I that the legal framework be changed.

Title I Schools	% Low-Income	Expenditure Per Pupil State and Local Funds (not including state or local compensatory education funds)
School A	60%	$200
School B	55%	$200
School C	40%	$450
School D	40%	$450
School E	10%	$700
School F	10%	$700

(footnote continued from previous page)
in the provision of base services, the SCE program would not qualify for an exemption (see especially pages 179-193 .).

Assume that the district-wide average percentage of children from low-income families is 30%; thus, all schools at or above the 30% level are eligible to receive Title I funds. Schools A-D listed above are eligible and schools E and F are ineligible.

Under the SCE exception to the no-skip regulations, the LEA may use SCE funds in schools A and B and Title I funds in schools C and D. Also, under the revised regulations, the LEA may then include schools A and B in calculations of the non-Title I average per pupil expenditure. Including A and B in the calculations has a dramatic effect on the non-Title I average.157/

If schools A and B were not included, the non-Title I average would be $700 per pupil. Including them lowers the average to $450 ([200 + 200 + 700 + 700] ÷ 4 = 450).

Were it not for the SCE exception from the no-skip provision, the comparability computations would discover the obvious discrimination against schools A, B, C, and D with respect to the provision of non SCE state and local funds.

(200 in A and B, $450 in C and D, $700 in E and F). Under the language of the revised regulations, the LEA is permitted to perpetuate this discrimination by manipulating the distribution of Title I and SCE funds. Such manipulation is directly contrary to the expressed purpose of the comparability requirement.

157/ As explained supra, n. 156, a LEA pursuing the above policy would be required to include its SCE funds for purposes of conputing comparability since in this situation SCE funds are being used to replace rather than supplement base services.

III. Title I Eligibility and Targeting of Children Requirements

As explained supra, the eligibility of school attendance areas to participate in programs under Title I is generally based on economic criteria, i.e., the number of children from low-income families residing in a school attendance area. However, the purpose of Title I, as set forth in the legislation is to provide LEAs with financial assistance to meet the special educational needs of educationally deprived children residing in low-income areas.[158] Consequently, the regulations[159] provide that after project areas have been chosen, educational deprivation rather than economic deprivation determines which students are (a) eligible for Title I programs, and (b) selected from among eligible children to participate in programs under Title I.[160] In general, children selected to participate in a Title I program, must be "most in need" of assistance.[161] In other words, a child must meet three basic criteria (subject to certain exceptions) to be selected for participation in a Title I program. First, the child must reside in a project area. Second, the child must be educationally deprived, regardless of the wealth of the child's family. Third, the child must be among those most in need of assistance.

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[158] Section 141(a)(1) of Title I (20 U.S.C. 241e(a)(1)).

[159] 45 C.F.R. §116a.21(c) and (e)(1976).

[160] A detailed description and analysis of the requirements pertaining to the targeting of children appears in the Project's papers cited to supra, n.11.

[161] 45 C.F.R. §116a. 21(d) and (e) (1976).

In this section, we analyze the relationship between the third criterion--that a child be most in need of assistance--and SCE programs.[162]

By legal compulsion or desire, LEAs may seek to use SCE funds in lieu of Title I funds for children who are "most in need" of assistance--children who are the intended beneficiaries of Title I. As a result, the LEA may seek to use Title I funds for children whose needs are less pressing. In this section we will consider the extent to which an LEA may use SCE and Title I funds in this manner.

In this analysis we will assume that the SEA legal framework requires that SCE funds be targeted on children most in need of assistance. In other words, the SCE and Title I programs both target the same children.[163] An LEA faced with the need to reconcile the targeting requirements of the federal and state programs has at least three possible options:

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[162] The first criterion, i.e., that the child must reside in a project area, was discussed in the previous section, *supra*, at p. 276.

[163] The same issues are raised by an LEA which desires to target SCE funds on the children most in need, but is not compelled by the SCE legal framework to do so.

> (1) The LEA could first use SCE funds to provide supplementary services to eligible children most in need and then layer Title I funds on top of SCE funds to serve the same children, with the possible result that the total level of funds for such children might be more than is deemed necessary to provide a supplementary program of sufficient size, scope, and quality.
>
> (2) The LEA could ignore the SCE targeting requirements, skipping children who are most in need that reside in Title I areas. Such children would then receive only Title I funds, and SCE funds would be used for children in non-Title I areas.
>
> (3) The LEA could use SCE funds for children most in need, in lieu of Title I funds, on the condition that the SCE program provided such children a supplementary educational program of the same nature and scope as that which Title I would have provided. Title I funds would then be used for eligible children whose needs are less pressing.

In the following paragraphs we consider the legal merits of these three options.

Option 1. Option 1, in our opinion, is consistent with the Title I legal framework. However, as a matter of policy, it would appear undesirable and overly restrictive to require an LEA to provide more funds from state and federal sources than would be necessary to provide a program of sufficient size, scope, and quality.

Option 2. Option 2 violates the supplement, not supplant, provisions for reasons that were considered in detail in the preceding chapter. Briefly, Option 2 is unacceptable because SCE funds would be distributed in a manner that is discriminatory to children eligible for Title I funds, who but for the existence of Title I, would have received a SCE program rather than being skipped. As discussed in the earlier chapter, once a state establishes a targeting requirement for distribution of SCE funds, that requirement must be followed, without regard to the existence of Title I. Here the LEA has taken into consideration the existence of Title I, reducing SCE funding for Title I children because Title I funds are available to serve the same children.

Option 3. In our opinion, Option 3 would be consistent with the present Title I legal framework. The state, in accordance with its objective criterion, has distributed SCE funds to educationally deprived children most in need. Option 3 is simply a variation of the no-skip exception contained in 45 C.F.R. §116a.20(c)(1976) except that, rather than skipping attendance areas that have the greatest need, Option 3 skips the educationally disadvantaged children who are in the greatest need because they are adequately served by SCE programs. In both cases, Title I funds are made available to additional educationally deprived children eligible for Title I. Although Option 3 is consistent with the Title I legal framework, it is not expressly treated in the existing regulations. We recommend that a regulation specifically authorizing Option 3 be issued. The policy foundation for this recommendation is identical to that applicable to the skipping of high-ranked attendance areas where SCE programs provide services of the same nature and scope as those that would otherwise be provided under Title I.[164] The regulations should indicate that an LEA must use Title I funds to meet the needs of children who are most in need of assistance, unless such children are designated to receive (through the use of funds from other sources) services of the same nature and scope as would otherwise be provided under Title I.

164/ See 45 C.F.R. §116a.20(c)(1976).

CHAPTER 10

COORDINATING TITLE I AND STATE COMPENSATORY EDUCATION PROGRAMS

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CHAPTER 10

COORDINATING TITLE I AND STATE COMPENSATORY EDUCATION PROGRAMS

I. Introduction

The previous chapters in this part analyzed the relationship between the Title I comparability, supplement, not supplant, equitably provided, private school, parent involvement and school attendance area and child targeting requirements and the state compensatory education legal frameworks included in our survey. This final chapter analyzes the legal requirements concerning the coordination of Title I and state compensatory education programs at the program development and design stage.

Specifically, this chapter describes the following aspects of the federal legal framework: (a) the general coordination requirements; (b) coordination requirements specifically applicable to state and local compensatory education programs; (c) the simultaneous use of Title I and state or local compensatory education funds; (d) restrictions concerning the commingling of funds from different sources; and (e) the use of consolidated applications and the comprehensive planning approach to the development of a single compensatory education program, including five legal models developed by OE for joint funding from Title I and state compensatory education sources. In the Chapter on supplanting and the equitably provided requirement we assumed that joint funding was possible but did not consider the details of how this could be done, which is discussed here.

Following the description of the federal legal framework we discuss specific applications of the federal coordination principles in several situations where the state legal requirements governing the SCE program are different from Title I. This discussion analyzes, among other issues, the appropriateness of employing various OE models in these different contexts.

The final section of this chapter includes our conclusions and recommendations. We have concluded, based on our analysis of the federal legal framework that the legal problems resulting from attempts to design a coordinated Title I and state compensatory education program are not substantial, and, many current problems result from insufficient dissemination of existing OE policies.

The purposes of the Title I coordination provisions are (a) to prevent duplication of effort and promote efficient use of resources; and (b) to ensure fiscal accountability -- ensure that Title I funds are spent only for permissible purposes and ensure that program auditors can determine, after the fact, that such was the case.

The coordination provisions do not create any substantive requirements pertaining to fund distribution or program design.

Specifically, with respect to SCE[165] programs, the coordination provisions do not

(1) create any requirements concerning the distribution of SCE funds to attendance areas or children within attendance areas,

(2) create any requirements concerning the services which may be purchased with SCE funds,

(3) create any exceptions to existing Title I requirements governing the use of Title I funds.[166]

Other Title I provisions create such requirements and exceptions, and these provisions are analyzed in other chapters of this paper. Coordination of Title I and SCE programs must be consistent with these other requirements but the coordination provisions, themselves, add nothing new to the substance of these requirements.

Thus, the coordination provisions do not require SCE

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[165] State compensatory education program. As discussed earlier, both locally and state funded compensatory education programs are considered SCE programs.

[166] The coordination provisions do not, for example, create an exception allowing Title I funds to be spent in ineligible areas or on ineligible children. The fact that an LEA uses SCE funds in Title I areas for purposes similar to Title I does not change the LEA's obligation to spend Title I funds properly according to all existing federal requirements.

funds to serve only Title I areas or program participants.[167]
They neither require nor prohibit the use of application forms on which grant requests for several programs might be made (see Chapter 1, supra, at 62). Moreover, the coordination provisions place no more substantive restriction on the joint use of Title I and other program funds than do the general supplanting provisions.

Our major recommendations in this area do not require the modification of any existing federal policy. We do recommend that OE formalize many of the policies it has already developed with respect to such issues as: the simultaneous use of Title I and state or local compensatory education funds, the use of a consolidated application form, and the legal models for the joint funding from Title I and state sources of a comprehensively planned compensatory education program.

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[167] Chapters 7 and 8, supra, offers several examples of how SCE funds may legally be spent on children ineligible to receive Title I services.

II. The Federal Legal Framework

A. Introduction

The coordination requirement included in the revised regulations is divided into three sections. The first section states that an LEA, in designing a Title I program, must demonstrate that it has taken into consideration resources available from other sources and has considered suggestions and offers of assistance made by other agencies.

The second section of the revised regulations pertaining to coordination explains (a) the circumstances under which LEAs may simultaneously use Title I funds and funds from other federal sources for specific components of a single project; and (b) the requirement that LEAs maintain separate accounts for each funding source. (Commingling of funds is prohibited.)

The third section of the revised coordination regulations concerns the relationship between Title I and SCE programs. This section provides that to the extent SCE funds are "designated and available" for a particular service, these SCE funds must be used rather than Title I funds.

Set forth below is an analysis of these three sections of the revised regulations on coordination, including specific references to the coordination regulations in effect during our interviews.

In addition, we describe the basic models developed by OE for developing a coordinated compensatory education program using Title I and SCE funds.

B. Consideration of Resources and Offers of Assistance from Other Agencies

Section (a) of the Title I coordination regulations in effect during our interviews included a requirement that the LEA, in the course of developing its Title I application, take into consideration resources available from other sources before expending Title I funds to make a given purchase. The requirement provided that the LEA must demonstrate in its application that it has coordinated its efforts with other agencies in the development of the Title I program or project and then demonstrate that it will coordinate its efforts with other agencies in the operation of the program or project.[168]

Specifically, the regulations provided that the LEA must demonstrate in its application, first, that the LEA "has taken into consideration those benefits that are or may be made available for the affected children through various agencies of the Federal Government, as well as through State and local agencies and private non-profit organizations,"[169] and second, that it "has coordinated the program or project with programs available through such agencies or organizations, [see above] including community action programs under Title II (42 U.S.C. 2781-2831) of the Economic Opportunity Act of 1964."[170]

The program guidelines went further, suggesting that each

> Title I application should present sufficient information to show that the resources available to the [LEA] and to other local agencies have been considered in planning the program, and that where appropriate those resources have been committed to certain program objectives. The application should show not only that the resources of other programs were considered in planning but also that there will be appropriate coordination of related services in the actual operation of a comprehensive program.[171]

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[168] 45 C.F.R. §116.24(a)(1974).

[169] Id.

[170] Id.

[171] Program Guide #44, Section 3.1.

Section 116.41(a) of the revised regulations is similar to §116.24(a) of the old regulations. In addition to the general requirement that an LEA demonstrate consideration of benefits made available through other public agencies; §116.41(a) of the revised regulations contains two additional requirements. First, the LEA must demonstrate that it has considered suggestions and offers of assistance made by other agencies. Second, the LEA must make Title I applications available far enough in advance of final formulation to enable such agencies to make meaningful suggestions and offers.

Specifically, the revised regulation provides:

> (a) Coordination in development of application. Each application by an applicant agency for a grant under Title I shall demonstrate that, in the development of such application, the applicant has taken into consideration benefits which are or may be available through other public and private agencies, and which would contribute toward meeting the special needs of educationally deprived children. Such application shall also demonstrate that the applicant has considered suggestions and offers of assistance which have been timely, made by such agencies and which may aid in carrying out or making more effective the program or project for which application is made. Applicants shall, upon request, make their applications available to interested public and private agencies far enough in advance of final formulation to enable such agencies to make meaningful suggestions and offers. 172/

172/ §116.41(a), 41 F.R. 42906 (September 28, 1976).

C. Simultaneous Use of Funds and Restriction Against Commingling

The regulations in effect during our interviews specified that LEAs not commingle Title I funds with funds from "other [state or federal] programs," i.e., Title I funds must be placed in a separate account.[173] However, the regulations also explained that the "simultaneous use of funds under each of those [federal or state] programs to finance identifiable portions of a single project is permitted."[174]

The meaning of this provision which both permits simultaneous use and prohibits commingling of funds from Title I and other programs, was considered in a recent decision of the HEW Audit Hearing Board involving the State of Nebraska. In this case, a state had interpreted the commingling prohibition as precluding the simultaneous use of Title I and state funds. As a result, certain LEAs used Title I funds to provide special educational services which could have been at least partially funded by available state funds.

OE's brief before the Hearing Board rejected the states contentions, stating:

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[173] 45 C.F.R. §116.24(c)(1975).

[174] Id.

Audit Hearing Board stated:

> In order for Title I funds to be properly administered and accounted for, the Commissioner promulgated a provision in Section 116.24(c) of the regulation (45 C.F.R. §116.24(d) which prohibits the commingling of Title I funds with funds under any other program. As described in Program Guide #24 commingling is a concept which prevents program funds from two sources from being drawn upon indiscriminately and is designed to insure that Title I monies only be used in projects which meet all the requirements of the Title. It is essential to the proper administration and accountability of federal programs.
>
> Nothing in the prohibition against commingling would limit a state's applying for state and local funds which could be used for purposes similar to Title I. To the contrary, the regulation clearly states that the simultaneous use of funds from Title I and other programs is permitted, as long as the accounting for such funds is separate and not commingled.[175]

This policy with respect to simultaneous use and commingling of funds is now specified in §116.41(b) of the revised regulations. The revised regulations, however, include two modifications in the language employed. First, although they state that an LEA may simultaneously use funds under Title I and "other *Federal* programs," the revised regulations are silent with respect to the simultaneous use of Title I funds and state funds. Second, the revised regulations clarify the particular circumstances under which the simultaneous use of Title I and "other federal" funds is permitted.

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[175] OE's interpretation was affirmed by the Hearing Board. Appeal of the State of Nebraska, Docket No. 8-(10)-74, October 16, 1975.

Specifically, the revised regulations provide that

> The simultaneous use of funds under Title I and funds under *other federal programs to support discrete portions* of a particular project is permissible if (1) the requirements of each program, considered separately, are satisfied with respect to that portion of the project which is being financed from such program; and (2) there is no commingling of funds derived from one appropriation with funds derived from another appropriation; and (3) there is no transfer of funds derived from an appropriation to the use of an activity not authorized by the law authorizing such appropriation. [Emphasis added.] 176/

The predecessor provision, 45 C.F.R. §116.24(c)(1974), quoted earlier, applied not just to other *federal* programs but to *all* other programs. The deletion of any reference to state programs in the revised regulations is inexplicable

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176/ §116.41(b), 41 F.R. 42906 (September 28, 1976).

since OE correspondence written shortly before the publication of the revised regulations directly applies the principles contained in the revised regulations to state compensatory education programs.

Does the deletion of references to state programs in the revised regulations signify a major shift in policy and a repudiation of the letters written just prior to the issuance of the revised regulations? Does the deletion mean that there may be no "simultaneous use" of Title I and state or local funds "to support discrete portions of a particular project?" Or, perhaps, does this mean that Title I and state or local funds may be "commingled" or "transferred" in ways that "other federal program" funds may not?

We conclude that the answer to these questions must be no. The revised regulations were intended to expressly clarify, not change, the law. Title I funds must, of necessity, be used simultaneously with state and local funds in providing programs for educationally deprived children; otherwise, the Title I funds would not "supplement" state and local efforts. Furthermore, all the reasons for not allowing commingling or transferring of Title I and other federal funds apply equally to Title I and state or local funds. Commingling of funds, moreover, was always prohibited by the "fiscal records" requirement, as well as the express anti-commingling provision of 45 C.F.R. §116.24(c). In addition, 45 C.F.R. §100b.257(1976) of GEPA provides that the SEA must provide for the proper safeguarding of all federal funds so as to ensure that all federal funds received are expended "solely for the purposes for which granted." Furthermore, 45 C.F.R. §100b.301(c)(1976) of the GEPA regulations requires that LEAs maintain effective control over and accountability for all federal funds to ensure that federal funds are only used for authorized purposes. Finally the Title I "fiscal records" requirements (Section 141(a)(7) and 142(a)(2) of Title I) simply repeat in different terms the records requirements of Section 434(a) of GEPA and 45 C.F.R. §100b.477(1974), a GEPA regulation which continues in effect.

D. Use of State and Local Funds "Designated and Available" for Compensatory Education

The revised regulations include a third section on coordination which applies directly to the use of state and local funds to support compensatory education programs. It ensures that Title I funds will be used for supplementary purposes and not to replace funds available from SCE sources. This section is new, although the principle imbedded in the section has always been implicit in the "supplement, not supplant" requirement. As explained supra, at p. 225 of Chapter 8 concerning the supplement, not supplant and equitably provided provisions, LEAs must generally layer Title I funds on top of SCE and state base funds. In other words, to the extent state base funds and SCE funds are "designated and available"[177] for a particular service they must be used for that service; Title I funds may only be used to supplement these services.

The section of the revised regulations especially applicable to state or local compensatory education programs provides:

> Use of state and local funds. A program or project set forth in a project application that meets all

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[177] Although the revised regulations do not explain the phrase "designated and available", it is possible to infer its meaning and scope from the HEW Audit Hearing Board decision cited supra, and from other Title I requirements. Thus, it would appear that SCE funds must be used to pay for specific services to the extent a state law "designates" them for such purposes. Further, the LEA may not use Title I funds to pay for these services to the extent state and local funds for them are "available." To the extent the state does not provide sufficient funds to support "designated" services for all eligible children, such services must be provided on an equitable basis without regard to the availability of Title I (see supra, Chapter 8 for a discussion of the equitably provided provision.)

> of the requirements of Title I shall be funded from state and local funds to the extent that such funds are specifically designated and available at the time of application for particular services included in the project. Under the conditions set forth in this section, Title I funds may be used to provide those services not provided by funds from other sources. [Emphasis added.] [178]

In the preamble to the revised regulations, OE includes the following explanation concerning the purpose and meaning of this provision:

> Section 116.41(c) emphasizes that funds currently available through state and local categorical programs which are appropriate for funding components of the Title I programs must be utilized rather than Title I funds. [Emphasis added.] [179]

E. Consolidated Application/ Comprehensive Planning

1. Introduction and Overview

As described *supra*, at least one state included in our survey has promoted "comprehensive program planning" [180]

178/ §116.41(c), 41 F.R. 42906 (September 28, 1976).

179/ 41 F.R. 42897 (September 28, 1976).

180/ This term is defined *supra* at p.22.

under which an LEA is required to design a single comprehensive program for meeting the objectives of several federal and state compensatory and special programs. To implement this strategy, the state has developed a "consolidated application."[181]

On various occasions, OE in correspondence with SEAs has expressed tacit approval of the consolidated application approach if and only if the consolidated application form satisfies all application approval standards set forth in §142(a)(1) of Title I and §434(b) of GEPA. These provisions generally require that an SEA approve only those Title I applications submitted by LEAs which comply with all LEA program requirements, including requirements such as school attendance area and child eligibility and targeting, parent involvement, general aid, needs assessment, program design, supplanting and comparability.

The reason why consolidated applications must meet all Title I requirements is to ensure that the SEA is able to determine that the use of Title I funds will be consistent with the Title I legal framework and to ensure that the SEA is able to make that determination before use of the Title I funds begins.

One letter from OE to an SEA explained that the SEA, because of the use of a consolidated application, may be approving applications from LEAs which do not meet basic Title I requirements, i.e., "the applications fail to set forth a discernible, discrete project . . ." which satisfies all of the Title I requirements.

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[181] This term is defined supra at p. 22.

Although a consolidated application is permissible, OE made clear that the SEA must still determine that Title I funds are "expended for and only for" purposes which satisfy each and every Title I requirement. Title I funds cannot be used, for example, to meet the needs of ineligible children in Title I areas, children in non-Title I areas, or the entire school district. In short, the SEA must be able to determine that the intended beneficiaries of the Title I Act are in fact receiving the level of funds to which they are entitled under the Title I legislation.

2. OE Models

a. Introduction -- In addition to the general statements of policy outlined above, OE, in correspondence, has described five models for pursuing a comprehensive planning approach.

The five models simply reflect different ways of varying two factors -- children served and services provided. Under models 1 and 3, Title I and SCE funds provide different services to the same children -- either different programs (model 1) or different components of the same program (model 3). Under the other three models, Title I and SCE funds serve different children -- either different grade levels (model 2), different groups pre-determined according to some factor other than grade level (model 4) or different schools (model 5).

In addition, hybrid models can be developed from two or more of the above five. Numerous combinations are possible. Thus the five models can be used as building blocks to construct a multi-faceted program.

Set forth below is a description of each model and an analysis of the circumstances under which an LEA may choose one model over another.[182]

b. Each Source Funds Discrete Supplementary Programs for the Same Children (Model 1) -- Under the first model OE explains that LEAs may fund discrete supplementary programs for children eligible to participate in a Title I program "in tandem."

"For example, remedial reading services could be funded with Title I funds while remedial math and auxiliary services would be funded with state and local compensatory education funds."

In implementing this model, OE has indicated that LEAs and SEAs must still comply with the supplement, not supplant and equitably provided requirements analyzed supra.

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[182] The reader should keep in mind that under each model described infra, Title I funds can only be used to meet the needs of educationally deprived children residing in low-income areas, i.e., Title I areas. Under no circumstances may Title I funds be used in areas ineligible for assistance under Title I.

In accordance with these two provisions, an LEA must distribute state and local compensatory education funds according to objective criteria without regard to the availability of Title I funds. A permissible objective criterion might be "the number of children scoring in the first quartile (Q_1) on a standardized test." The LEA must calculate the number of children qualifying for assistance under this criterion and then decide, given the level of funding by the state legislature, how many children may actually participate in a program. In distributing these funds, the LEA may not penalize children residing in areas eligible to receive assistance under Title I. Thus, under this model, if the state compensatory education funds, which are to be provided to Title I eligible areas in satisfaction of the equitably provided and supplement, not supplant requirements, exceed the amount needed to fund the math and auxiliary services component, the total level of state support due these areas eligible under Title I must still be provided; any amounts not needed to fund the math and auxiliary services must be used to support other compensatory education program components.

> If this process results in unused state compensatory funds in a local educational agency, those state funds would have to be used to replace Title I funds, in order to comply with the 'supplement, not supplant requirements'.

c. Each Source Funds Different Grade Levels (Model 2) -- The second model suggested by OE is to use state and local funds for one grade level, e.g., K-6, and Title I funds for a different grade level, e.g., 7-12.

d. Each Source Funds Discrete Program Components for the Same Children (Model 3)[183] -- Under the third model, OE explains that an LEA may fund particular program components with Title I funds and other components with state compensatory education funds.

> Particular parts of program components will be costed out in advance, item by item and the LEA will decide which funding source will pay for which item. For example, an identified reading teacher will be funded by Title I while the workbooks that he or she uses will be funded [under the state compensatory education program].

e. Each Source Funds a Discrete Program for Different Children (Model 4)[184] -- The LEA may decide "to pay for a discrete program of supplementary services for a certain predetermined set of educationally deprived children out of state or local compensatory funds." This model could operate within the same grade or school.

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[133] The OE correspondence explains that where this method is used, a cost allocation plan must be negotiated and approved by the SEA and the HEW Regional Office prior to implementation. See 45 C.F.R. §100b.81 (1975) and relevant section of Appendix B attached thereto.

[184] Id.

f. Each Source Funds Different Schools (Model 5) -- This model provides a discrete program in some areas with Title I funds and uses SCE funds to provide a similar program in areas eligible for, but unserved by, Title I. This option is not expressly set forth in OE correspondence but it is expressly contemplated by the "no-skip exemption" contained in the revised regulations. This exemption is discussed in Chapter 9 of this paper. For our purposes here it suffices to say that this exemption allows an LEA to not serve with Title I funds a Title I eligible school that has been designated to receive state or locally funded services "of the same nature and scope as those that would otherwise be provided under Title I." This, essentially, is a fifth coordination model. (Note -- there are other requirements that must be met in order to employ this model; the discussion here is not complete; a complete discussion is found in Chapter 3 .)

g. Summary -- Certain general principles governing the models can be stated. First, as mentioned earlier, SCE funds must generally be distributed to attendance areas and children eligible to participate in Title I programs,[185] in accordance with objective criteria and without regard to the availability of Title I funds.

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[185] Title I eligible areas and children do not have to receive all the SCE funds, where the state distribution system provides for a proration or proportionate share to all areas in the district satisfying state criteria. Thus, SCE programs may extend into areas ineligible to receive Title I funds, but models 1 and 3 may not be employed in such areas. These models use Title I and SCE funds to serve the same children, i.e., these models can only be used in LEAs which use SCE funds for children who satisfy Title I eligibility and targeting requirements.

Second, under model 1 or 3, the children served must be the educationally deprived children having the "greatest need."[136] This is simply because under these models Title I and SCE funds are provided to the same children; thus, the children served must meet all Title I requirements. This does not mean, however, that all SCE programs must meet Title I targeting requirements because Title I does not require LEAs to choose model 1 or 3. Other models may be used.

Third, particular characteristics of SCE programs may make one model more attractive to an LEA than another. For example, under the Michigan Chapter 3 program, LEAs are required to satisfy rigorous evaluation requirements with respect to each child included in the state program. If the LEA were to choose either model 1 or 3 it would be required to satisfy the state evaluation requirements for a substantially larger number of children than if it were to select one of the other models since, under models 1 and 3, children are considered as participating in both the Title I and state program, though specific components of the single program are accounted for separately. If models 2, 4, or 5 were used the state evaluation requirements would only apply to the children receiving the state funds, a smaller number than under 1 or 3.

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[136] The "greatest need" requirement is discussed in Chapters 3 and 5 of the Legal Standards Project's"An Analysis of the Basis For and Clarity, and Restrictiveness of the Program Requirements Applicable to Local School Districts Applying for Grants Under Title I of the Elementary and Secondary Education Act of 1965"(1977).

Under other circumstances, however, model 1 or 3 might be preferable to other models. For example, if an SCE program, as legislated, were not similar to Title I, its fund would not necessarily be excludable from comparability computations (see Chapter 7, supra); however, a way to ensure that the SCE funds as actually used, could be excluded from comparability computations would be to properly coordinate them with Title I funds using either model 1 or 3.

III. Relationship Between the Federal Legal Framework and State Legal Frameworks With Respect to the Coordination Requirement

A. Introduction

In the previous section of this chapter we set forth five models developed by OE which an LEA may use in designing and funding a compensatory education program with Title I as well as state compensatory education funds in areas eligible to receive assistance under Title I. However, not all OE models are equally applicable. The appropriateness of a particular model under the above described circumstances depends on the nature of the legal requirements set forth in the state legal framework. This section analyzes the relationship between specific state provisions and the five OE models.

B. State or Local Compensatory Education Programs Similar to Title I Which Target Children Differently than Title I

Recall that under the Title I legal framework, only "educationally deprived children" as the term is defined in the Title I regulations (§116a.2, 41 F.R. 42914, September 28, 1976) are eligible to receive assistance under Title I. The Title I regulations also provide that the LEA must target, i.e., select, from among the eligible students, children who are "most in need of assistance" (§116a.21(d), 41 F.R. 42918, September 28, 1976). Under the regulations in effect during our interviews, the targeting requirement included the phrase "greatest need for assistance"(45 C.F.R. §116.17(f) (1974)).

Under the "greatest need" standard, an LEA was authorized to "target" all educationally deprived children in the highest ranked schools or target the children who were furthest behind at schools eligible for assistance under Title I. For purposes of this paper, it is assumed that an LEA pursuing one of the two alternatives described above would also satisfy the "most in need" standard.

Recall further that under most state compensatory education legal frameworks reviewed by the project (*see* Part II), requirements for targeting children were generally *not* similar to those of Title I. In fact among state legal frameworks included in our survey, most did not include a requirement that children most in need be targeted. The question is raised as to the legal options available to an LEA (a) where federal and state targeting requirements are similar; and (b) where federal and state targeting requirements are dissimilar.

First, where Title I and state requirements for targeting children are similar, the LEA might select any of the five OE models described *supra*.

Where the targeting requirements are *dissimilar*, the LEA would not be able to use Model 1 (each source funds discrete supplementary programs for the *same children)* or Model 3 (each source funds discrete program components for the *same children*), since these models assume that all participating children satisfy the requirements of both the Title I and state standards.

However, the LEA may pursue the second model (each source funds programs at different grade levels), the fourth model (each source funds a discrete program for different children), or the fifth model (each source funds different schools). Under these three models, it is possible to design a single comprehensive program.

For example, an LEA might design a single comprehensive reading program. Applying the fourth model, Title I funds may be used to pay for those children satisfying the Title I requirements. Other participating children could qualify under the state requirements, even if the latter group of children would not be considered "most in need" under the federal rules. With respect to the children participating under the state program, the only condition for determining eligibility is that these children be "educationally deprived," and that only state funds be used for their reading program.

In sum, the Title I coordination requirements do not mandate that the state compensatory education requirements concerning targeting of children be identical to Title I requirements. The state may include unique provisions or not include any requirements at all so long as the children included in the state program are "educationally deprived" and Title I funds are used only for children qualifying under Title I requirements.

C. State or Local Programs Similar in Nature To Title I Which Extend Into Areas Ineligible To Receive Assistance Under Title I

Recall that in previous chapters concerning Title I comparability and the supplement, not supplant and equitably provided provisions we explained that an LEA may use state or local compensatory education program funds in areas ineligible to receive assistance under Title I so long as Title I areas are not penalized in the distribution of the special state or local funds. Such funds must be distributed according to objective criteria without regard to the availability of Title I funds.

Therefore, the question for consideration in this section is not whether an LEA may provide compensatory education programs funded with state or local resources in areas not eligible to receive assistance under Title I; rather the issue concerns the practical mechanics of designing a coordinated program which satisfies all Title I requirements, especially the requirements ensuring that Title I funds be used only for educationally deprived children residing in eligible areas.

An LEA which funds from federal and state sources a compensatory education program extending into areas ineligible for assistance under Title I may only use SCE funds in these Title I ineligible areas, but may select any of the five models described to use to fund joint programs in Title I eligible areas.

However, to the extent the coordinated program includes, for example, (a) inservice training for all compensatory education teachers in the district (in Title I as well as non-Title I areas, or (b) teachers who work in both Title I and non-Title I schools, the LEA must ensure that Title I funds (a) pay only for the inservice training of teachers providing services to program participants eligible for Title I and not for teachers instructing children ineligible for Title I; and (b) pay only for that portion of the teacher's training which corresponds to the portion of that teacher's time devoted to instruction of participating children eligible for Title I. In such situations OE models give the LEA several options.

First, under Model 1 or Model 3, the LEA may use state funds to provide the inservice training and require the compensatory education instructor to move either between Title I schools or between non-Title I schools.

The LEA might also wish to design a single compensatory education program for all educationally deprived children and fund certain children under Title I and others under SCE. In Title I eligible areas the program for certain children would be paid for with state funds with other identified children receiving assistance under Title I; all children receiving assistance in areas ineligible under Title I would be funded under the state program. The cost of inservice training (see above) would then be apportioned according to whether the teacher instructs children receiving assistance under Title I or the state program.

In each case, the program itself need not be modified to satisfy the Title I accountability provisions. The inclusion of school attendance areas not eligible to receive assistance under Title I is acceptable so long as Title I funds are not spent in areas, or for children, ineligible for Title I and educationally deprived children residing in Title I areas are not penalized in the distribution of state or local compensatory education funds. The LEA must simply set up an effective accounting procedure and allocate funds in accordance with formula in an approved plan (see supra, note 133).

D. State or Local Programs Similar to Title I Which Include Requirements More Exacting than Title I Requirements

Under the Michigan Chapter 3 program, LEAs are required to satisfy rigorous evaluation requirements with respect to each child included in the state program. If the LEA were to choose either the first or third OE model, it would be required to satisfy the state evaluation requirements for a substantially larger number of children than if it were to select one of the other models since under the first and third models children are considered as participating in both the Title I and state program, even though specific components of the single program are accounted for separately.[187]

However, the LEA is not required to pursue any particular model -- the LEA can choose the one considered most appropriate. In the situation where the state requirements are more exacting than the Title I provisions an LEA might wish to employ the second, fourth, or fifth model, since any of these models allows the LEA to focus on separate groups of children, one group eligible under Title I and the second group eligible under the state program.

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[187] The Chapter 3 program contains a provision requiring that Chapter 3 funds supplement and not supplant federal funds (see supra.). We are uncertain as to whether the LEA in order to satisfy this provision must select only the first or third models, both of which provide for the layering of state and federal funds on the same children.

Under the fifth model, for example, the LEA might use state funds for Title I eligible children in some Title I eligible schools. Title I funds could then provide similar services in the remaining schools eligible under Title I. Applying this model, the LEA is required to satisfy the more demanding evaluation requirements only with respect to those children receiving assistance under the state program -- unless otherwise required by state law.

E. State or Local Programs Similar in Nature to Title I Which Include State Exhaustion Requirements

The Washington URRD legal framework requires that the LEA exhaust other available sources of revenue before it uses state compensatory education funds, "wherever possible." Since the Title I legal framework includes a similar exhaustion provision, the question is which requirement controls, and if it is the Title I exhaustion requirement, does the "wherever possible" language excuse the LEA from exhausting Title I funds first?

As explained *supra* the coordination provisions contained in the revised regulations and interpreted by OE in the preamble to the revised regulations require an LEA to first utilize state rather than Title I funds for programs appropriate for funding under both programs. Since this is a federal requirement which an LEA must satisfy before its application may be approved by the SEA, we conclude that the federal exhaustion policy controls.

If the "wherever possible" proviso is interpreted by state authorities as excusing LEAs from exhausting Title I funds first, then the state exhaustion requirement would not be inconsistent with the federal requirement. [We are not willing to interpret state law.] As explained above, however, to the extent the state law is interpreted to require the exhaustion of Title I funds before the LEA may use state special funds, we conclude that an LEA complying with the state policy would be violating the Title I coordination requirement and therefore the SEA could not approve its Title I application.

F. State Or Local Programs Identical To Title I

As explained *supra* in Part II, the regulations implementing Florida's SCE program in existence during our interviews[188] provided for the development of a single program designed and implemented, consistent with all Title I requirements. Specifically, the state regulations provided:

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[188] As explained *supra*, in August, 1977 Florida enacted new SCE legislation, thereby repealing the SCE legislation described in the paper.

- funds available to each district for compensatory education shall be combined to support a single program. This program shall follow the USOE current guidelines for ESEA Title I.

- Districts shall submit a single application.

In sum, Florida's program (which was only funded for one year) simply provided additional funds to be used for Title I eligible children in Title I eligible areas to provide programs acceptable under Title I.

Under such a SCE program which is identical in every respect to Title I, the question is raised whether the commingling requirements and the suggested models described above must be pursued by the LEA?

We conclude and recommend that an SEA or LEA which uses SCE funds to design and implement a single compensatory education program which satisfies all Title I requirements be exempt from the prohibitions against commingling.

In this situation it is not necessary to trace or be able to differentiate between Title I and SCE funds because all SCE funds are to be used for the same areas, children, and programs provided for under Title I, and the program satisfies all Title I requirements.

Under the proposed exemption, to the extent HEW auditors find that compensatory education funds have been mis-expended, we recommend that the federal government seek repayment in proportion to its contribution. For example, if Title I funds constitute 90 percent of the total expenditure for the joint SCE and Title I program and HEW auditors find that $1,000 have been misspent, the LEA must repay the federal government $900.00.

In the other examples described above, we assumed that SCE programs were similar but not identical to Title I; therefore all Title I requirements would not be applicable. In these examples, ineligible areas and children, different educational objectives and evaluation schemes, different parent participation provisions, and different management and fiscal requirements are all possible.

In these situations, the commingling requirement is necessary. As referenced supra., the HEW Audit Hearing Board's decision explains that the commingling concept

> prevents programs funds from two sources from being drawn upon indiscriminately and is designed to ensure that Title I monies only be used in projects which meet all the requirements of the title.

In other words, if commingling were permitted where a SCE program is not identical to Title I, it may be impossible to determine whether Title I funds were being used only for permissible purposes.

IV. Conclusions and Recommendations

Except for deleting the word "federal" from the simultaneous use provision of the revised regulations (see supra) and explaining the meaning of the phrase "designated and available" in the section of the coordination requirement concerning the use of state and local funds (see supra), changes in the legal framework are not needed. The problems LEAs and SEAs are having in this area are not with the coordination requirements, themselves; rather they concern compliance with the other substantive provisions concerning SCE programs and Title I. The model strategies developed by OE, if clearly explained and more widely disseminated, would help SEAs and LEAs avoid these problems. Therefore, we recommend that OE incorporate into its regulations a statement of the various models for coordinating Title I and state compensatory education funds, including examples concerning how these models are to be applied under commonly occurring situations.